Court File No.: CV-23-00698576-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL CORPORATION

Applicants

- and -

STATEVIEW HOMES (MINU TOWNS) INC., STATEVIEW HOMES (NAO TOWNS) INC., STATEVIEW HOMES (ON THE MARK) INC., TLSFD TAURASI HOLDINGS CORP. AND STATEVIEW HOMES (HIGH CROWN ESTATES) INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

BOOK OF AUTHORITIES OF KINGSETT MORTGAGE CORPORATION

September 7, 2023

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INDEX

INDEX

LIST OF AUTHORITIES

CASE LAW	
TAB	**AUTHORITY**
1.	*Royal Bank v Sun Squeeze Juices Inc*., (1994) CarswellOnt 266 (Ont Sup Ct (Commercial List))
2.	*Royal Bank v. Sun Squeeze Juices Inc*., 1994 ONCA 8771
3.	*First Treasury Financial Inc. v. Cango Petroleums Inc.*, 1991 ONSC 8338
4.	*Bank of Montreal v Owen Sound Golf & Country Club Ltd*., 2012 ONSC 557
5.	*2403177 Ontario Inc. v Bending Lake Iron Group Ltd*., 2016 ONSC 199
6.	*2403177 Ontario Inc. v. Bending Lake Iron Group Limited,* 2016 ONCA 485
7.	*Grant Forest Products Inc. v. The Toronto-Dominion Bank,* 2015 ONCA 570
8.	*Ivaco Inc., Re,* 2006 ONCA 34551
9.	*Bank of Nova Scotia v. Huronia Precision Plastics Inc.*, 2009 ONSC 2319
10.	*American General Life Insurance Company et al. v Victoria Avenue North Holdings Inc. et al.,* 2023 ONSC 3322
OTHER SOURCES	
11.	North American Milling Company Limited and Woodbine Holdings Ontario Inc., Ancillary Administration Order, Court File No. CV-17-588420-00CL, May 18, 2018
12.	Erwin Hymer Group North America, Inc., Order (Bankruptcy Application and Interim Distribution), Court File No. CV-19-614593-00CL, June 25, 2019
13.	Virk Hospitality Corp., Order (Authorization to Bankrupt Virk Hospitality Corp.), Court File No. CV-18-00604099-00CL, April, 23, 2020
14.	TheRedPin.Com Realty Inc., Order (Assignment in Bankruptcy), Court File No. CV-18-599644-00CL, May 14, 2020
15.	3174026 Canada Inc., Order, Court File No. CV-21-00674530-00CL, May 27, 2022

TAB 1

1994 CarswellOnt 266
Ontario Court of Justice (General Division — Commercial List)

Royal Bank v. Sun Squeeze Juices Inc.

1994 CarswellOnt 266, [1994] O.J. No. 567, 24 C.B.R. (3d) 302, 46 A.C.W.S. (3d) 821

ROYAL BANK OF CANADA v. SUN SQUEEZE JUICES INC. and BEIT-KIRUR LTD.

Farley J.

Heard: February 28, 1994
Judgment: March 16, 1994
Docket: Doc. B253/93

Counsel: *J.A. Carfagnini* and *R. Chadwick*, for Coopers & Lybrand Ltd., court-appointed receiver and manager.
Paul G. Macdonald, for plaintiff.
Edward M. Morgan, for defendants.
Ronald M. Moldaver, Q.C., for Josef Blum, majority shareholder of defendants.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.2 Effect of order
Debtors and creditors
VII Receivers
VII.2 Jurisdiction of court to appoint
Headnote
Bankruptcy --- Receiving order — Effect of receiving order
Receivers --- Jurisdiction of court to appoint
Receiving orders — Effect — Court having jurisdiction to require receiver-manager to consent to receiving order pursuant to petition — Appropriate for court to require consent where bankruptcy best position for debtor and for trustee to resolve certain issues — No interested party to be prejudiced by receiving order.
The bank issued a petition for a receiving order against the defendant company, naming a proposed trustee. The company filed a Notice Disputing the Petition. The court appointed a receiver-manager, which reported that the company's operations were no longer feasible. The receiver-manager was authorized by the court to realize upon the company's assets.
The issue before the court was whether it should authorize the receiver-manager to consent to the receiving order.
Held:
The receiver-manager was directed to consent to a receiving order pursuant to the petition.
The evidence showed that the company was indebted to the bank and that it had not, within the six months preceding the petition, met its liabilities generally as they became due. Several actions had been commenced against the company. The receiver-manager saw little benefit to incurring further costs to defend the actions given the bank's priority position and the fact that it would suffer a significant shortfall on its loans. It was appropriate in the circumstances to direct the receiver-manager to consent to the receiving order. Bankruptcy would allow the trustee to resolve the allegations of fraudulent preferences to the company's majority shareholder, and to investigate suspicious circumstances surrounding a secret bank account. Further, since the company was merely an insolvent shell, its assets having been sold and its operations having been discontinued, no interested party would be prejudiced by a receiving order.
Table of Authorities
Cases considered:

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), affirmed (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *referred to*
Brandon Packers Ltd., Re (1962), 3 C.B.R. (N.S.) 326, 33 D.L.R. (2d) 503 (Man. C.A.), leave to appeal to S.C.C. refused [1962] S.C.C. ix — *referred to*
Can Corp Financial Services Ltd., Re (1991), 4 C.B.R. (3d) 99 (Ont. Bktcy.) — *referred to*
Chinavision Canada Corp. v. Ling (January 12, 1994), Doc. B285/92, Farley J. (Ont. Gen. Div. [Commercial List]) — *referred to*
Everex Systems Inc. v. Pride Computer Distribution Ltd. (1988), 68 C.B.R. (N.S.) 24 (B.C. S.C.) — *considered*
First Treasury Financial Inc. v. Cango Petroleums Inc. (1991), 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Gen. Div.) — *referred to*
Goodis-Wolf Inc., Re (1990), 80 C.B.R. (N.S.) 146 (Ont. Bktcy.) — *considered*
Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *referred to*
Prairie Palace Motel Ltd. v. Carlson (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.) — *referred to*
Western Hemlock Products Ltd., Re (1961), 2 C.B.R. (N.S.) 207, 35 W.W.R. 184, 27 D.L.R. (2d) 457 (B.C. S.C.) — *referred to*

Statutes considered:

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

s. 38

Company Act, R.S.B.C. 1979, c. 59 —

s. 110

s. 111

Petition for receiving order.

***Farley J.*:**

1 The critical question to be answered is whether this Court has the jurisdiction to authorize a Court-appointed Receiver and Manager ("R/M") either to assign a debtor company into bankruptcy or to consent to a receiving order being issued against the debtor company. The second question is, if so, whether this Court should so authorize this R/M in these circumstances.

2 On July 21, 1993 the Royal Bank of Canada ("Bank") issued a Petition for a Receiving Order ("Petition") against Sun Squeeze Juices Inc. ("Sun") naming Coopers & Lybrand Limited ("Coopers") as the proposed Trustee. The next day the Court appointed Coopers as R/M on a motion by the Bank, Sun's secured creditor to the extent of approximately $16 million. On August 6th Sun filed a Notice Disputing the Petition ("Dispute"). The R/M was to report to the Court as to the feasibility of continuing the operations of Sun. In its report of August 6th the R/M advised that this was unfeasible and recommended that Sun's operations be discontinued. On August 12th this Court au thorized the R/M to realize upon Sun's assets. Sun is no longer carrying on business as its assets now have been sold with Court approval.

3 Despite the disarray and gaps in the financial and other records of Sun, has determined that Josef Blum ("Blum"), the majority shareholder of Sun, had withdrawn approximately $1.2 million from bank accounts of Sun during the year prior to the R/M's appointment. Contrary to the arrangement with the Bank, a second (and secret) bank account was opened at the Bank of Nova Scotia ("BNS"). Collections which were not referenced in Sun's accounts receivable sub-ledger were deposited in the BNS. The R/M was unable to determine that the monies withdrawn by Blum were used in the business operations of Sun. The R/M has concluded that Sun was insolvent at all relevant times and it appears that these withdrawals had been made with a view to preferring Blum over other creditors. The R/M considers these payments to be fraudulent preferences as defined under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA"). The R/M has similar views as to monies obtained by Blum out of the account at the Bank.

4 Sun's Dispute alleged that Sun was not indebted to the Bank and that it had not, within the 6 months preceding the Petition, failed to meet its liabilities as they generally became due. Given the unchallenged July 8, 1993 letter of Bank counsel to Sun (attention Blum) which recites Blum's request to forbear acting on the demands for payment to afford an opportunity to Sun to submit a proposal for the repayment of the Bank's loans, I am puzzled how Sun can baldly and boldly dispute that it was not indebted to the Bank. Similarly it seems difficult to understand the disagreement concerning the general meeting of its liabilities given the significant number of outstanding accounts and the number of suppliers which had commenced actions against Sun.

5 Actions have been commended and followed up on by three suppliers and one customer. The R/M has examined these claims and concluded that they appear, on their face, to have some basis in law. However, any successful claim would rank only as an unsecured creditor against the estate of Sun. As the Bank will suffer a significant shortfall on its loans, the R/M sees little benefit to incurring further costs to defend these actions given the Bank's priority position. As to Sun's claims in some of these actions, the R/M advises that it does not have sufficient information to prove these claims. The Bank advised the R/M that it had no interest in funding any of the litigation, including, one assumes, the $75 million suit instituted by Sun and Blum against the Bank the day after the July 8th letter setting out their request for forbearance by the Bank so as to allow them to present a repayment proposal. If Sun were put into bankruptcy, then assuming that the Trustee does not pursue any of the litigation (which appears to be a dead certainty), any creditor (including Blum) who wishes to pursue it may do so at his own cost and for his own benefit pursuant to s. 38 of the BIA. See: *Re Can Corp Financial Services Ltd.* (1991), 4 C.B.R. (3d) 99 (Ont. Bktcy.) at p. 107.

6 As to the first question, I do not see that there is any dispute that this Court has the power to authorize the Court-appointed R/M to either file an assignment in bankruptcy or consent to the Petition. See: *First Treasury Financial Inc. v. Cango Petroleums Inc.* (1991), 3 C.B.R. (3d) 232 (Ont. Gen. Div.) at p. 240; *Re Brandon Packers Ltd.* (1962), 33 D.L.R. (2d) 503 (Man. C.A.), at pp. 510-511 and 513, leave to appeal to S.C.C. refused [1962] S.C.C. ix; *Prairie Palace Motel Ltd. v. Carlson* (1982), 42 C.B.R. (N.S.) 163 (Sask. Q.B.) at p. 165; *Chinavision Canada Corp. v. Ling* (Ont. Gen. Div.) my unreported decision released Jan. 12, 1994. As Freedman J.A. said in *Brandon* at p. 511:

> The Editor expresses doubt whether a liquidator has power to file an assignment in bankruptcy. With deference, I would suggest that we are concerned not so much with the powers of a liquidator as the powers of a Judge of the Court of Queen's Bench. After all, a liquidator is subject to the jurisdiction of the Court in the same manner as an ordinary officer of the Court (s. 395 of the *Companies Act*). Here Mr. Flintoft did the wise and proper thing by applying to the Court for directions. The assignment in bankruptcy was not filed on his own motion but by express direction of the Court. Was the Court empowered so to direct him? We must bear in mind that we are here concerned with the authority of a superior Court in whose favour jurisdiction should be presumed unless it is expressly or by implication excluded ...

7 As to whether a Court-appointed R/M takes precedence over the directors and shareholders of the company as to which it is appointed, I believe this has been adequately canvassed in Walter and Hunter, *Kerr on the Law and Practice as to Receivers and Administrators*, 17th ed. (London: Sweet & Maxwell, 1989), at p. 219; *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264 (Alta. Q.B.) at p. 268, affirmed without this point (1989), 65 Alta. L.R. (2d) 374 (C.A.); *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at p. 111.

8 Freedman J.A. in *Brandon, supra*, observed at p. 511 that it would not be "necessary that the Court should first of all call upon the directors so to act. The Court is not bound to do a futile thing." It would seem to me that the Court in *Everex Systems Inc. v. Pride Computer Distribution Ltd.* (1988), 68 C.B.R. (N.S.) 24 at 28 (B.C. S.C.) dealt not with the jurisdiction of the Court and the capacity of a Court-appointed R/M, but rather it over concentrated on the wording of sections 110 and 111 of the *Company Act*, R.S.B.C. 1979, c. 59.

9 As Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada* 3rd ed., Vol.1, (Toronto: Carswell, 1992) express it, where there is a conflict between an assignment and an existing petition, the proper procedure is for there to be a consent to the receivership order being made pursuant to the petition. See at pp. 2-48-2-49 where it is said [at D§12]:

> **(a) Conflict Between Assignment and Petition**

> There has been a great deal of litigation over which has priority if both an assignment and a petition are filed. However, the procedure to be followed appears now to be well established, and it is this: (1) if a petition is filed first and the Official Receiver knows of the petition, he should not accept an assignment but should request the debtor to consent to the receiving order being made forthwith; (2) if the Official Receiver accepts the assignment, the court will set it aside and make the receiving order on the petition: *Re Lalonde* (1924), 4 C.B.R. 416 (Ont. S.C.); *Re Lakeshore Golf & Country Club* (1933), 19 C.B.R. 127 (C.S. Que.); *Re Slavonia SS Agencies* (1922), 3 C.B.R. 153 (Ont. S.C.). The reasoning behind these cases is that bankruptcy proceedings are primarily for the benefit of creditors, not debtors, and the trustee selected by the creditors is to be preferred over one selected by the debtor: *Re Croteau & Clark Ltd.* (1920), 1 C.B.R. 364, 48 O.L.R. 359, 55 D.L.R. (413 (S.C.).

Therefore, if circumstances dictate that Sun be put into bankruptcy, it would appear appropriate for the R/M to consent to a receiving order being made pursuant to the Royal Bank's Petition of July 21, 1993. I followed that course in *Chinavision, supra*, at p. 4 as well.

10 Courts in Canada have specifically held that the Court has jurisdiction to authorize and direct a Court-appointed R/M or liquidator to put a debtor company into bankruptcy. See *Prairie Palace, supra*, at p. 65; *Re Western Hemlock Products Ltd.* (1961), 2 C.B.R. (N.S.) 207 (B.C. S.C.) at p. 210; *Chinavision, supra*, at pp. 4-5. Guy J.A. in *Brandon, supra*, said at p. 513:

> Must the Court then close its eyes to the facts as reported by its own officer? It is my feeling that no amount of bankruptcy or winding-up legislation can fetter the Court to the extent that it must remain blind to the reality of bankruptcy.
>
> In this case the Court *directed* its appointee to make an assignment in bankruptcy. It is true the Court might have suggested to a creditor that he launch a petition to have the company declared bankrupt; but this, surely, is asking the Court to shirk its plain responsibility and place that responsibility on some third party. When the affairs of the company are under the jurisdiction of the Court, it must accept and fulfill its duty and give judgment "according to the very right and justice of the case".

11 Thus this mater boils down to whether in the circumstances I should authorize the R/M to consent to the receiving order. Each case of course must be determined on its own facts. It seems to me that where there is an obvious insolvency then the Court should examine whether there is a "need" for a bankruptcy and if this need overcomes any contras. For this purpose I will ignore the technicality that given the all encompassing receiver and manager order issued on July 22, 1993, there is reason to question whether the officers and directors had any ability to issue the Dispute. See the discussion of this point above in *Kerr, Hat* and *Nova, supra*. The question of "need" for a bankruptcy was canvassed in *Prairie Palace, supra*, at p. 165 and *Chinavision, supra*, at pp. 4-5.

12 Sun's counsel submitted that where a Petition was disputed, the trial of the issue must be held. He cited *Re Goodis-Wolf Inc.* (1990), 80 C.B.R. (N.S.) 146 (Ont. Bktcy.) as standing for the principle that where there was outstanding litigation between the petitioner and the debtor company it was appropriate to stay the bankruptcy petition pending the determination of the various litigation in progress. I am of the opinion that it is an overstatement. Firstly, it was merely a factor to consider; secondly, it was determined in those circumstances that if the petition were granted, the two commenced actions would be unlikely to go to trial. It was acknowledged therein at pp. 154-155 that:

> *The existence of a prior civil action has not always resulted in the court staying or dismissing a petition*: see, for example, *Re Hutchens* (1983), 46 C.B.R. (N.S.) 234 (Ont. S.C.); and *Re H.M. Simpson Ltd.* (1989), 77 C.B.R. (N.S.) 24, 79 Nfld. & P.E.I.R. 307, *(*sub nom. *Jenkins Transfer Ltd. v. H.M. Simpson Ltd.)* 246 A.P.R. 307 (P.E.I.C.A.). However, in many cases, petitions have been stayed because of a dispute which the court considered better dealt with by the civil trial process. Here, we have a longstanding civil action and no prejudice shown to other creditors if the petition were to be stayed. The petition is part of the battle between the petitioning creditor and the debtor. There is a question in my mind whether the bankruptcy process should be resorted to in such circumstances. I was told that a pre-trial in the first action was cancelled because of the intervening petition. The action should be able to be tried at an early date. It would be less than satisfactory

> to all the parties if all the issues in the litigation were not dealt with. While there may be little likelihood of Goodis-Wolf successfully establishing the claim for advertising work, I consider, on balance, that it is preferable that the litigation be allowed to take its course.

13 [emphasis added]

14 That case is not this case however. I am of the view that bankruptcy would be a preferable condition for Sun. The trustee could advise creditors (including Blum) that it did not wish to pursue the litigation (including the $75 million claim against the Bank); I am of the view that such a process would maximize the chance of any valid and sustainable litigation being pursued since the undertaking creditor would be financing litigation under which it would be the initial beneficiary (and ultimate as well in the case of Blum pursuing the Bank litigation). It would also allow the Trustee to resolve the question of whether the payments to Blum were fraudulent preferences, thereby keeping an even hand among the creditors. As well it would allow the Trustee to fully investigate the suspicious circumstances of the unauthorized and secret BNS account to which there were deposits of surreptitious collections of some of Sun's accounts receivable. Lastly, it would not appear that any interested party (including Sun itself) would be prejudiced by a receiving order issuing since Sun is merely an insolvent shell, its operations and assets having been sold and its business discontinued. Bankruptcy proceedings are class actions on behalf of all creditors and the Trustee must be mindful of the interests of all parties including the shareholders of the bankrupt company.

15 In conclusion I am of the view that it would be appropriate to direct the R/M to consent to the receiving order pursuant to the Petition and allow the Trustee if it proceeds as expected to advise the creditors of the possibility of one or more of them pursuing the existing litigation pursuant to s. 38 of the BIA. There is to be a receiving order issue in the usual form with Coopers & Lybrand Ltd. as Trustee.

Receiver-manager directed to consent to receiving order.

End of Document

TAB 2

Court of Appeal for Ontario
Royal Bank v. Sun Squeeze Juices Inc.
Date: 1994-10-25
(Docs.CA C18187, C18188)

October 25, 1994. The judgment of the court was delivered by

[1] GRANGE J.A.: – Counsel for Blum speaking on behalf of Sun Squeeze has asked for an adjournment on the ground that Sun Squeeze is unrepresented. We cannot accede to the request. This appeal was expedited in April so the efforts to obtain new counsel after Mr. Laskin's appointment do not appear to have proceeded in earnest until this month. Moreover Mr. Laskin did not have active control of the matter in his firm. We think the prejudice to the other parties is such that the appeal must proceed today.

* * * * *

[2] On proceeding with the appeal, Mr. Moldaver stated that he was not retained by Sun Squeeze. He was permitted to proceed and argued fully and ably the merits of the Sun Squeeze appeal.

[3] In our opinion the appeal cannot succeed. The Receiver/Manager had the authority to recommend the consent to the Petition. We are not prepared to say that in all cases the consent and recommendation of the Receiver/Manager alone would enable a Court to adjudge a debtor bankrupt in the face of a dispute. Nevertheless in this case, the debtor participated and was fully heard. On all the evidence the Judge found that there was no possibility of the Dispute succeeding and it was in the interest of all parties for the Receiving Order to go. We agree with those findings and we would therefore dismiss both appeals. The respondents are entitled to their costs out of the bankrupt's estate.

Appeal dismissed.

TAB 3

Ontario Court (General Division)

Citation: First Treasury Financial Inc. v. Cango Petroleums Inc.
Date: 1991-03-21

Austin J.

Counsel:
Fred M. Catzman, Q.C. and *W. Brown*, for First Treasury Financial Inc.
Paul R. Basso and *Alex MacFarlane*, for Cango Petroleums Inc. et al.
Sean Dunphy, for Lincoln Capital Funding Corp. and KKC Inc.
H. Margles, for Aectra Refining & Marketing Inc.
David J.T. Mungovan, for Petro Canada Inc.
K. McElcheran, for Canadian Imperial Bank of Commerce.
David Chaiton and *Harvey Chaiton*, for Deloitte & Touche Inc.

[1] AUSTIN J.:—This is a motion for the appointment of a receiver and manager under a debenture. The debtor moves at the same time for relief under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the Act).

[2] The debtor consists of a group of companies known collectively as Cango Petroleums. Cango operates a number of gasoline service stations in Ontario. It does not have a refinery. In the language of the petroleum industry, Cango is known as an "independent". Some 238 stations carry the Cango sign, 38 on property owned by Cango and 148 on property leased to Cango. The remaining 52 are operated under dealer agreements.

[3] Cango's major secured creditors and the amounts owing to them are approximately as follows:

CIBC	$ 3-4 million
First Treasury	11.2 million
Lincoln	3.5 million
KKC	4.4 million
Allcorp Petroleum	5.5 million
Aectra	4.6 million
Total —	$32.2-33.2 million

[4] Of this group, Allcorp is different in that it is controlled by the Allen family. The Aliens control Cango.

[5] In addition, there are said to be separate mortgages on individual properties totalling approximately $3,607,000 and capital leases for turnkey construction of stations and for equipment and leases totalling about $4,802,000. Until very recently, Cango bought most of its gasoline from Petro Canada and Sunoco. The former is said to be owed $8.7 million. There is also said to be owing $3.2 million on account of Ontario fuel tax.

[6] The motion for a receiver is brought by First Treasury and is supported by Lincoln, KKC and Petro Canada.

[7] Cango defaulted on a payment due February 15, 1991, to First Treasury for $100,000 on account of principal, plus interest. Lincoln and KKC gave notice of default under their security on September 27, 1990, and following that entered into discussions and negotiations with Cango. The notice of default was withdrawn. The payments due to Lincoln and KKC on January 15 and February 15, 1991, were not made. Again, discussions were held, but they did not resolve the problem and Lincoln and KKC gave notice on March 5, 1991, demanding payment in full of the $8,146,009.48 said to be due to them.

[8] At the end of January, 1991, Petro Canada demanded payment of $1,768,647. It was not paid, and thereafter Cango bought gasoline from Petro Canada on a c.o.d. basis. Sunoco is also effectively on a c.o.d. basis.

[9] On February 11, 1991, the CIBC called its loan and credit then outstanding in the amount of $6,222,478.22. Cango was unable to meet this demand and on February 28, 1991, the bank seized $1.8 million from Cango's account to apply to the indebtedness to the bank.

[10] Cango admits it is insolvent. It blames its condition on the war in the Persian Gulf which began in August, 1990, and ended within the past few weeks. It alleges a "dramatic increase in the world price of oil" and, at the same time, the failure of retail gasoline prices to reflect the increase in the cost of product. No specifics are provided.

[11] Cango also says that its supply contracts with Petro Canada and Sunoco were based upon credit limits determined when the price of gasoline was much lower, and as a result Cango cannot buy enough gasoline to meet its requirements. Again, no specifics are furnished, nor is any explanation given as to why new credit limits could not be negotiated with Petro Canada or Sunoco, or with other suppliers. Since these proceedings began, a new supply arrangement has been established. No details are provided.

[12] Cango also pointed to the rationing of gasoline by Petro Canada, combined with that supplier's demand that Cango maintain its payments for product at the level earlier agreed upon, as contributing to its cash flow problems. Cango admitted that it had sustained a cash loss of over $750,000 in the period from October to December, 1990, and a further loss of approximately $1,000,000 in January, 1991.

[13] Cango proposes that it be granted relief under s. 11 of the C.C.A.A. Specifically, it requires a stay of proceedings against it while it devises a plan to salvage what it can of the operation. The C.C.A.A. application is brought admittedly in response to the motion to appoint a receiver, although it should be noted that the receivership motion was not launched until March 2, 1991, and, as early as January 14, 1991, each company in the Cango group issued an "instant debenture" so as to bring itself within the requirements of s. 3 of the Act.

[14] In general terms, what Cango proposes is a 90-day stay of proceedings against it, during which time it will finalize sales of groups of its stations to Beaver Petroleum (Shell) and Canadian Tire, pay the CIBC and First Treasury in full, sell other stations where appropriate, continue to close stations with "negative cash flow", hire two additional financial consultants

and try to restructure its financing. In the meantime, it proposes to continue its retail operations, buying gasoline using only the cash flow it can generate through sales.

[15] Cango's position is that, given the protection of the Act, it could operate on its own cash flow and "down-size" its operation and, at the same time, make it more efficient; all of this with a view to staying alive for the benefit of all. "All" includes in this context the bank, the other secured creditors, the employees, and possibly even the unsecured creditors.

[16] In my view, Cango's financing problems existed long before the war. Edward J. Allen, a senior member of the family, began leasing gasoline stations from Ultramar, a refiner, in 1972. In 1980 he sold out the business, then consisting of 17 stations. From 1981 to 1988, Allen carried on business with Murray Hogarth, another independent, mostly under the name "Pioneer". By 1986 there were about 100 stations, and by 1988, 150. In 1988 Allen bought out Hogarth and embarked on a program of even more rapid expansion under the name Cango.

[17] This was financed initially by the CIBC. By the fall of 1989 it became apparent that more financing would be required. This was obtained, with some difficulty, through First Treasury, Lincoln and KKC in May, 1990.

[18] Even this additional financing was not sufficient to pay down the bank to the extent required. In June, 1990, Cango retained Allan H.T. Crosbie of Crosbie & Co., a specialty merchant bank to "assist the Cango Group with its financial difficulties". Specifically, Crosbie was hired "to negotiate a sale of all or part of the assets of the Cango Group". Crosbie has been working on behalf of Cango since June, 1990, and has been able to arrange tentative sales of 31 stations to Beaver, and another possible 11 to Canadian Tire. Crosbie is currently involved in discussions with other possible purchasers in Winnipeg, Vancouver and Italy.

[19] Cango was already in a vulnerable financial condition before the war entered the picture. If the war or its consequences caused any additional strain, a proposition of which I am not persuaded, it was because of Cango's pre-existing situation. Other circumstances, as for instance a prolonged price war, might have precipitated the present predicament. One contributing cause, for instance, might be the excessive capital expenditures of which Lincoln complained in the fall of 1990.

[20] Having said that, there can be no doubt that for some reason or reasons, Cango's position deteriorated very rapidly in the fall of 1990. As at December 30, 1990, Cango's interim consolidated balance sheet showed a shareholders' equity of *minus* $9,280,000. The shareholders no longer had any stake in the company at that stage.

[21] In order to be qualified to make an application under the Act, a company must be insolvent or have committed an act of bankruptcy. Cango qualifies in both respects. The company must also have outstanding bonds issued under a trust deed. As noted above, Cango deliberately qualified itself in this respect some months ago.

[22] The Act is remedial legislation intended to enable an insolvent company, under judicial supervision, to have an opportunity to put forward a plan with a view to continuation as a going concern. To this end, the legislation should be given a broad and liberal interpretation:

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the *status quo* for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

Re Meridian Developments Inc. and Tbronto-Dominion Bank (1984), 11 D.L.R. (4th) 576 at p. 580, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215 (Alta Q.B.) *per* Wachowich J.

> ... this legislation should be used and limited to where there is a reasonable chance the insolvent company can continue to operate its business as a going concern.

Stephanie's Fashions Ltd. (Re), B.C.S.C., January 24, 1990 (unreported) [summarized 25 A.C.W.S. (3d) 1071] *per* MacKinnon J. at p. 4:

> There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed.

Nova Metal Products Inc. v. Comiskey, Ontario Court of Appeal, released November 23, 1990 (unreported) [since reported 1 C.B.R. (3d) 101 at p. 115, 41 O.A.C. 282, 1 O.R. (3d) 289 *sub nom. Elan Corp. v. Comiskey*] *per* Finlayson J.A.

> I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset.

Nova Metal, supra, per Doherty J.A. at p. 129.

[23] From a practical perspective, Cango was in difficulty well before the war in the Persian Gulf. The cause or causes of its difficulty may be too rapid growth, or under-financing, or any one of a dozen other reasons. It is not necessary to determine the actual cause. Cango itself recognized the difficulty, if not the reasons for it and has been engaged in searching for a solution for the past nine months. It has achieved a tentative sale of 31 stations to Beaver and a possible sale of a further 11 to Canadian Tire. Cango has also shut down 30 other stations "because those outlets had always generated negative cash flow".

[24] Cango recognizes that these steps are not sufficient, but over a period of nine months has not come up with anything more specific by way of a solution than the general statement set out in its material and summarized above.

[25] The Act contemplates that the debtor company will first ask the court for a stay of proceedings and will then, during the stay, produce a plan of arrangement. In the "normal" case, however, the debtor company will not have been searching for a solution for nine months without coming up with something more definitive than the general proposals put forward here.

[26] In the present case, Cango is simply asking the court to stay the hands of creditors in the hope that, in whatever period of grace is granted, something more will happen than has occurred during the past nine months, and that that something will permit the company to be

salvaged.

[27] On the evidence presented, I am unable to conclude that there is a reasonable chance that Cango will be able to continue to operate its business as a going concern.

[28] The Act contemplates a plan being brought forward and being voted on by the various classes of creditors. Before the court will consider approval, the plan must have been accepted by a majority in number and three-quarters in value of the creditors or classes of creditors voting. While there is at present no plan, the positions of some creditors may be relevant at this early stage.

[29] Although Cango says it proposes to pay out First Treasury from the proceeds of the sale to Beaver, First Treasury opposes the making of an order under the Act. Lincoln and KKC are also opposed. Those three make up well over half of the value of the secured claims. That in itself would be sufficient to defeat any plan.

[30] In addition, Petro Canada is opposed to any order being made under the Act. Its claim constitutes well over half of the unsecured claims. Again, that in itself would be sufficient to defeat any plan. This assumes that Petro Canada would remain a substantial creditor at the time of the vote. It would be in Cango's interest to ensure that Petro Canada was not a creditor at that time, but no suggestion was put forward as to how that could be brought about.

[31] Petro Canada's position appears to have been influenced by the fact that in December, 1990, the Allen family enhanced its own position vis-à-vis Petro Canada to the extent of $5 million by taking security from the company to that value.

[32] Petro Canada may also have been influenced by some of the evidence revealed on the cross-examination of the president of Cango by counsel for First Treasury. This was to the effect that Lincoln and Cango had discussed three scenarios for the salvaging of the business and none of those scenarios involved paying anything to the unsecured creditors.

[33] Whatever the reasons, it appears highly probable that any plan put forward by Cango would be defeated by both the secured and the unsecured creditors voting in their respective classes.

[34] Aectra said it was "open to serious consideration of a C.C.A.A. proposal". This is doubtless dictated by its position behind First Treasury, Lincoln and KKC. Similarly, the CIBC was "neutral" as between an order under the Act and an order appointing a receiver. The probability remains, therefore, that whatever scheme could be put forward by Cango, it would be defeated by both secured and unsecured classes of creditors.

[35] Cango says "there are approximately 2,500 full-time and part-time employment positions within this network". How many are employed by Cango is not stated. There is no reason to believe that if a receiver were appointed there would be any more resulting unemployment than if Cango were to be left in control.

[36] Much was made of environmental protection. According to Cango, it is not a problem, and if it is Cango is best equipped to deal with it. According to second-hand information from

the Ministry of the Environment, gasoline spills may constitute a problem. To cover the situation, the proposed receiver, Deloitte & Touche Inc. has worked out an arrangement with the ministry which would, in the event it is appointed, limit its liability and that of First Treasury.

[37] Cango asks that proceedings against it be stayed and that it be given an opportunity to put forward a plan. That plan would involve the selling in whole or in part of the business. It was argued on behalf of First Treasury *et al.* that the only point of the application was to preserve some core of the gasoline business for the Allen family. That may well be the case; there seems to be little likelihood of any appreciable recovery by the unsecured creditors whether or not relief under the Act is granted. If a receiver is appointed, he or she will probably sell off all or part of the business. Accordingly, the issues reduce themselves to the question, who is likely to do the better job of selling off the assets? "Better" in this context means not only who will raise the most money, but also who will best administer and distribute the proceeds.

[38] Cango argues that it has already sold a good number of stations and that those sales may be lost if a receiver is appointed. No evidence was tendered to show that Beaver or Canadian Tire, or any other prospective purchaser, would be less willing to deal with a receiver than with Cango, or that Cango would be more likely to get a higher price.

[39] First Treasury, on the other hand, argued that in advertising the Cango properties as having a "net value of capital employed of $82.1 million", Crosbie was grossly exaggerating the situation. It was suggested that he was concerned with the agenda of the Allen family and not with anything else. First Treasury argued that if nothing else, a receiver would at least bring a level playing field to the sale proceedings.

[40] As to continued operation of the Cango stations, Deloitte has already made arrangements with Petro Canada for the supply and delivery of products on the same terms as Cango, *i.e.*, c.o.d., or on short term credit secured by a bank letter of credit. Petro Canada has also undertaken to provide technical assistance in the event it is required.

[41] I conclude that the application under the C.C.A.A. should be dismissed because:

(a) the object is not really to continue the present business, but to sell it off in whole or in part;

(b) the proposed receiver is in at least as good a position as Cango to sell;

(c) the creditors, secured and unsecured, have lost confidence in Cango's management;

(d) in any event, any plan Cango could put forward would almost certainly be turned down by both the secured and the unsecured creditors.

[42] An order will therefore go dismissing the C.C.A.A. application and appointing Deloitte & Touche Inc. as receiver and manager. A draft order was tendered on the hearing. It was in generally acceptable form, although the schedules referred to in the draft were not attached. If there is any difficulty settling the form of the order, I may be spoken to.

[43] The order should expressly empower the receiver to make a voluntary assignment in bankruptcy should he be so advised. Much of the Cango operation depends upon leased premises and it may be necessary to resort to the provisions of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, in order to deal effectively with those leases. Cango's application under the C.C.A.A. expressly contemplated resort to the *Bankruptcy Act.*

[44] The draft order deals with the costs of First Treasury on the motion to appoint a receiver. I may be spoken to by letter as to the costs, including quantum, of all parties to the C.C.A.A. application.

[45] These matters were heard on March 6th and I was unable to give judgment at that time. The foregoing paragraphs were written on March 8th and early in the week of March 11th. I was advised on March 14th that the sale to Beaver had been confirmed. This led to communications amongst counsel, and at their invitation I scheduled a meeting for March 19th at 9:15 a.m. At 9:18 I was advised that the meeting was no longer necessary.

[46] The confirmation of the sale to Beaver does not alter my views as to the proper disposition of these matters.

[47] Order accordingly.

TAB 4

CITATION: Bank of Montreal v. Owen Sound Golf and Country Club, 2012 ONSC 557
COURT FILE NO.: CV-11-9306-00CL
DATE: 20120123

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Bank of Montreal, Applicant

AND:

Owen Sound Golf and Country Club, Limited and Kenneth W. Rowe Limited, Respondents

BEFORE: D. M. Brown J.

COUNSEL: J. Simpson, for the Receiver, BDO Canada Limited

Keith Hagedorn, claimant creditor in person

HEARD: January 23, 2012

REASONS FOR DECISION

I. Receiver's motion to liquidate debtor corporations

[1] Last July BDO Canada Limited was appointed receiver of the Owen Sound Golf and Country Club, Limited ("OSGCC") and Kenneth W. Rowe Limited, a wholly-owned subsidiary of the Golf Club which owned property on which a practice facility was located (the "Debtors").

[2] Pursuant to orders of this Court the Receiver sold the Golf Club and ran a claims process for creditors. As a result, last October this Court authorized the Receiver to pay out the secured creditor, BMO, as well as the Canada Revenue Agency. The claims process for the other creditors has been completed, and the Receiver seeks approval to disburse funds to those claimants.

[3] On the return of the motion Mr. Keith Hagedorn, the former chef at the Golf Club, sought leave for an extension of time in respect of the claim which he had filed with the Receiver. Mr. Hagedorn had mailed in his claim before the claims bar date, but his letter was returned due to insufficient postage. By the time he had re-sent his claim he was 10 days past the claims bar date. The Receiver did not oppose the requested extension of time, and during a break in the

proceedings the Receiver and Mr. Hagedorn settled his claim for $5,000.00. Accordingly, I formally grant Mr. Hagedorn an extension of time in which to file his claim, declare that his claim as filed was received by the Receiver within the permitted extension, and approve the Receiver paying out the agreed upon $5,000 settlement.

[4] Upon payment of the unsecured creditors the Receiver will hold surplus funds of slightly under $1 million. The Receiver moves for authorization to place both Debtors into liquidation. The Receiver gave proper notice of this motion. Although no one has appeared to oppose the relief sought, one Club member contacted the Receiver to query its jurisdiction to put the companies into liquidation.

II. Analysis

[5] Kenneth W. Rowe Limited is incorporated under the *Ontario Business Corporations Act*.[1] OSGCC owns all of the shares of that company. Section 208(1) of the *OBCA* provides that a shareholder may apply to court for a winding-up order. Paragraph 4(r) of the Appointment Order made July 15, 2011 authorized the Receiver "to exercise any shareholder…rights which the Debtors may have". Therein lies the power of the Receiver to apply to wind-up OSGCC's subsidiary, Kenneth W. Rowe Limited.

[6] OSGCC is incorporated under the *Corporations Act*.[2] A few days before the appointment of the Receiver the entire Board of Directors of OSGCC resigned. Paragraph 3(c) of the Appointment Order authorized the Receiver to "manage, operate and carry on the business of the Debtors". As Cumming J. observed in *Ravelston Corp. (Re)*: "When a court-appointed receiver is appointed in the normal course, 'the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced'…The essence of a receiver's power is to settle liabilities and liquidate assets."[3]

[7] The Receiver has sold OSGCC's assets, satisfied the secured creditors, and administered a claims process for unsecured claims. Once the unsecured claims are paid, the Receiver will be left holding surplus proceeds. The shareholders are the next group entitled to claim against those funds, and the Receiver seeks to address that stage in the corporate life of OSGCC by seeking an order to wind-up that company. Section 244(1) of the *Corporations Act* authorizes a corporation to apply to court for a winding-up order. It is well settled that a court possesses the power to authorize a receiver to file an assignment in bankruptcy or consent to a bankruptcy order.[4] In my view the same logic applies to the power of the court to authorize a court-appointed receiver to apply to wind-up a company.

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[1] R.S.O. 1990, c. B.16.
[2] R.S.O. 1990, c. C.38.
[3] *Ravelston Corp. (Re)*, [2007] O.J. No. 414 (S.C.J.), para. 61; affirmed 2007 ONCA 135.
[4] *Royal Bank of Canada v. Sun Squeeze Juices Inc.*, [1994] O.J. No. 567 (Gen. Div.), paras. 6 to 10.

[8] In its Supplement to the Second Report the Receiver described the work which must be done in order to identify the current shareholders of OSGCC and proposed a notice and claims bar-like process to deal with claims by shareholders. The process proposed is a reasonable one.

[9] Accordingly, I grant the Receiver's motion for orders to wind up the Debtors and to appoint the Receiver as liquidator. I approve the winding-up process it proposes. I grant an order in the form submitted by the Receiver, which I have signed.

(original signed by)
D. M. Brown J.

Date: January 23, 2012

TAB 5

CITATION: 2403177 Ontario Inc. v. Bending Lake iron Group Limited, 2016 ONSC 199
COURT FILE NO.: CV-14-0274-00
DATE: 2016-01-08

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
2403177 Ontario Inc.	*Michael Strickland*, for the Applicant
Applicant	
- and -	
Bending Lake Iron Group Limited	*Robert MacRae*, for the Respondent
Respondent	
	Kenneth Kraft, for A. Farbert & Partners Inc.
	Paul Denton the Receiver *Caitlin Fell*, for Legacy Hill Resources Ltd.
	HEARD: December 29 and 30, 2015, and by way of written submissions received on January 6, 2016, at Thunder Bay, Ontario

Mr. Justice D. C. Shaw

Decision On Motion

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

[2] The Receiver brings this motion for an order:

- approving the Asset Purchase Agreement, dated November 27, 2015 (the "Sale Agreement") between the Receiver and Legacy Hill Resources Ltd. ("LHR"), as assigned by LHR to 1053895 B.C. Ltd. and satisfying the Receiver's execution of the Sale Agreement;
- approving the transaction contemplated by the Sale Agreement (the "Transaction") and authorizing the Receiver to execute any additional documents for the completion of the Transaction;
- vesting title in the purchased assets free and clear of all encumbrances;
- authorizing the Receiver to file an assignment in bankruptcy on behalf of the Debtor;
- approving paragraph 20 of the First Report of the Receiver, dated November 18, 2014, relating to legal work for which the Debtor continued to have responsibility;
- approving the Second Report of the Receiver, dated January 20, 2015 and the Third Report of the Receiver, dated November 30, 2015;
- approving the fees and disbursements of the Receiver and its legal counsel as set out in the Third Report; and
- authorizing the Receiver to seal the unredacted version of the Third Report, containing commercially sensitive information, filed with the court, until after the closing of the Transaction.

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

[4] BLIG brings a motion for an order that the court not approve the Sale Agreement and that the Receiver be restrained from dealing further with LHR pending further order of the court. BLIG also requests an order that it be entitled to disclose to the BLIG shareholders the

value of the LHR offer in the Sale Agreement and that BLIG be provided 90 days within which to arrange funding in an amount equal to the cash amount that LHR has agreed to pay under the Sale Agreement. BLIG seeks to have numerous paragraphs of the Receiver's Third Report struck.

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

Background

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

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

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

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

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

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

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

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

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

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

[16] Canada Revenue Agency has a claim for payroll deductions not made by BLIG, in the sum of $63,596.83 as of October 20, 2014. On August 25, 2015, Canada Revenue Agency gave

notice of an HST reassessment of $391,802.96, for the period August 11, 2011 to October 31, 2015.

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

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

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

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

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

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

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

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

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

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

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

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

> I attach our NDA if it works for you. I look forward to hearing from you.
>
> Kind Regards Andrew.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[41] The Receiver reports in its Third Report that Mr. Wetelainen was initially kept apprised of the Receiver's discussions with LHR and developments in their due diligence process. Mr.

Wetelainen attended meetings with LHR and facilitated a visit to the mine site with representatives of LHR in early June 2015. The Receiver reports:

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

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

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

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

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

[46] Mr. Wetelainen deposes that the Receiver did not provide BLIG with any information with respect to meetings between the Receiver and representatives of LHR on September 29 and 30, 2015 leading to the execution of non-binding Letter of Intent on September 30, 2015. BLIG

was not advised that LHR was intending to purchase the assets of BLIG. Mr. Wetelainen deposes that he continued to work towards the goal of refinancing BLIG while the negotiations between LHR and the Receiver for the sale of BLIG's assets were going on.

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

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

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

[49] Redacted

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

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

[52] The secured lenders have approved the Sale Agreement.

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

[54] BLIG submits that the Receiver has shown its partiality by failing to mention in its Third Report that BLIG was working with LHR to refinance or restructure the company when the Receiver knew or ought to have known that BLIG was to have a stake in the final arrangement. BLIG submits that the Receiver has refused to provide an affidavit which it

characterizes as evidence of conduct designed to deprive BLIG of its opportunity to fully canvass the deficiencies and inaccuracies in the Receiver's report. BLIG contends that the Receiver's Third Report is biased and drafted in such a way as to suggest to the court that certain events occurred or did not occur and, as such, the Third Report should be rejected by the court.

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[68] Although the Receiver owes a duty to all stakeholders, its primary duty in this case is to maximize the return for the secured credtiors. Even with the sale, the secured creditors stand to incur a shortfall on their security. They are the only parties with a real economic interest in the

sale. They support the sale. They do not want to hold out in the hopes of attracting a better offer, even in face of the shortfall.

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

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

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

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

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

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

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

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

[75] The Receiver negotiated in good faith with LHR. The Receiver's decision to enter into an agreement with LHR, under the circumstances at the time the agreement was negotiated was

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

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

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

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

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

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

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

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

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

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

[84] I understand BLIG to be submitting that although the Receiver could pursue a sale of assets, it was open to BLIG to pursue the alternative of a refinancing or restructuring without the Receiver's knowledge or consent. This flies in the face of paragraph 2 of Schedule "A" of the SISP Order which provides that the Receiver may solicit both or either the purchase of or

investment in the Debtor. If BLIG's submission is accepted, it could result in the Debtor working at cross-purposes with the Receiver and, as here, without the Receiver's knowledge of what marketing or solicitation activities that the Debtor might be engaged in.

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

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

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

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

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

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

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

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

[93] It bears repeating, in considering this attack on the Receiver's neutrality, that the Receiver had no knowledge of the Confidentiality Agreement between BLIG and LHR and no knowledge that BLIG had given LHR confidential documents, until this was revealed in Mr.

Wetelainen's affidavit of December 17, 2015. This was well after the non-binding Letter of Intent from LHR in September 2015 and after the November 27, 2015 Sale Agreement.

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

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

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

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

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

> (a) the Receiver would have learned of the Confidentiality Agreement between LHR and BLIG;
>
> (b) the Receiver would have learned of the confidential information that BLIG gave to LHR; and
>
> (c) the Receiver would have concluded that there was a fiduciary relationship between LHR and BLIG that precluded an asset purchase.

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

[100] The Receiver was never presented with any refinancing or restructuring proposal by LHR or BLIG. It had only an asset purchase proposal from LHR. If in fact, LHR was going to

refinance or restructure the company, it would have had to do so through the Receiver, not through Mr. Wetelainen.

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

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

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

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

[105] I do not find that the conduct of the Receiver shows any unfairness to BLIG. At all times, BLIG had all of the information that it needed and, indeed, certain information that the Receiver did not have, to make its own proposal. BLIG simply did not have the financial wherewithal to make a commercially viable offer to the Receiver. Even during the month after

BLIG became aware of the details of the Sale Agreement, it has not been able to put forward a concrete proposal, only a request for further time to raise funds.

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

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

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

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

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

Sealing Order

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

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

Fees and Disbursements of the Receiver and its Legal Counsel

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

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

[113] The Receiver wishes to assign BLIG into bankruptcy.

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

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

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

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

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

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

[120] To similar effect is the following statement by Wallace J.A. in *Bank of Montreal v. Scott Road Enterprises* 1989 Carswell BC 387 (B.C.C.A.):

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

[121] As observed in *Deakin v R.*, 2012 TCC 270 (Tax Ct. of Can.), at para. 24, the directors' liability provisions of the Excise Tax Act should be regarded by business persons as similar to a form of personal guarantee by the directors.

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

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

Thomas Unger

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

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

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

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

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

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

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

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

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

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

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

[134] On December 28, 2015, Mr. Unger wrote to the Receiver, criticizing the process that the Receiver had followed. He asked the Receiver to request that the Court approve the Binding

Letter of Intent from 1874084 on the grounds that it was better for the secured lenders than the offer from LHR.

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

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

> 16. Moreover, the fundamental purpose of the sale approval motion is to consider the best interest of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.
>
> 17. In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg*, supra; *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.). The examination of the sale process will in normal circumstances be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right of interest in a prospective purchaser that is affected by a sale approval order.
>
> …….
>
> 22. In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing

> on the motion on that basis nor is it now entitled to bring this appeal on that basis.

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

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

Motions by BLIG

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

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

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

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

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

Conclusion

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

Costs

[145] If costs of the motions are in issue, the parties shall contact the Trial Co-ordinator at

Thunder Bay within 30 days to set a date to speak to the matter, failing which costs shall be deemed to be settled.

"original signed by RSJ Shaw"

_____
The Hon. Mr. Justice D. C. Shaw

Released: January 8, 2016

CITATION: 2403177 Ontario Inc. v. Bending Lake iron Group Limited, 2016 ONSC 199
COURT FILE NO.: CV-14-0274-00
DATE: 2016-01-8

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

2403177 Ontario Inc.

Applicant

- and -

Bending Lake Iron Group Limited

Respondent

DECISION ON MOTION

Shaw J.

Released: January 8, 2016

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TAB 6

COURT OF APPEAL FOR ONTARIO

CITATION: 2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 485
DATE: 20160616
DOCKET: M46301 (C61637)
CV-14-274

Weiler, Cronk and Benotto JJ.A.

BETWEEN

2403177 Ontario Inc.

Applicant (Respondent)

and

Bending Lake Iron Group Limited

Respondent
(Appellant/Moving Party)

Robert MacRae, for the moving party, Bending Lake Iron Group Limited

Kenneth Kraft, John Salmas and Jordan Schultz, for the responding party, A. Farber & Partners Inc., in its capacity as court-appointed receiver of Bending Lake Iron Group Limited

Heard: In writing

On motion for leave to appeal from the order of Justice D.C. Shaw of the Superior Court of Justice, dated January 8, 2016, with reasons reported at 2016 ONSC 199.

BY THE COURT:

A. OVERVIEW

[1] On September 11, 2014, Bending Lake Iron Group Limited ("BLIG") went into receivership (the "Receivership Order"). A. Farber & Partners Inc. was appointed receiver over BLIG's property (the "Receiver") pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). On November 27, 2014, the court approved a Sales and Investor Solicitation Process for BLIG's property (the "SISP Order"). BLIG consented to the SISP Order.

[2] In December 2015, the Receiver moved for court approval of an asset purchase agreement with Legacy Hill Resources Ltd. ("Legacy Hill") for the sale to Legacy Hill of substantially all BLIG's assets (the "Sale Agreement"). BLIG opposed the motion and brought its own cross-motion seeking various relief, including the postponement of the sale. On January 8, 2016, the motions judge approved the Sale Agreement and ordered the vesting of BLIG's property in Legacy Hill upon the filing of a receiver's certificate (the "Approval and Vesting Order").

[3] BLIG filed a notice of appeal dated January 13, 2016, seeking to set aside the Approval and Vesting Order. By order of this court dated March 22, 2016, Brown J.A. (In Chambers) ruled that BLIG required leave to appeal under s.

193(e) of the *BIA.* Accordingly, he quashed BLIG's notice of appeal and set a timetable for the filing of BLIG's leave materials.

[4] BLIG now seeks leave to appeal the Approval and Vesting Order. Should leave be granted, it proposes to argue on appeal that the motions judge erred: i) in finding that the Receiver had acted reasonably and fairly in negotiating the sale of BLIG's property, and that the actions of BLIG in undertaking parallel negotiations with Legacy Hill contravened the Receivership and the SISP Orders; and ii) in failing to consider whether the Receiver discharged its obligation to consult with "affected Aboriginal communities" in approving the Sale Agreement. BLIG submits that the proposed appeal is of general significance to insolvency practice, is *prima facie* meritorious and would not unduly delay the insolvency proceedings.

[5] For the reasons that follow, we are not satisfied that the test for granting leave to appeal has been met. Accordingly, the leave application is dismissed.

B. FACTS

[6] BLIG is an iron ore mining development company with its major asset being a mine site in Thunder Bay, Ontario. While BLIG was initially successful in raising equity financing to develop the mine site, it was unable to arrange any major financing in 2011 and 2012. In 2012, BLIG engaged in negotiations with a foreign company to raise significant debt and equity financing. In anticipation of

successful financing, 2403177 Ontario Inc. advanced a series of loans to BLIG to fund development of the mine. Unfortunately, the financing fell through and development of the mine was suspended in 2013.

[7] At the date of its receivership in September 2014, BLIG owed in excess of $3.5 million to secured creditors, more than $8 million to unsecured creditors and approximately $450,000 to the Canada Revenue Agency. Pursuant to the SISP Order, the Receiver compiled a list of interested parties, through consultation with BLIG and the Receiver's network of investors in the mining and investment communities. In excess of 120 interested parties were contacted by the Receiver and 12 signed confidentiality agreements. However, no offers or proposals for purchasing, refinancing or restructuring BLIG were received by the extended deadline of March 27, 2015.

[8] While the SISP was underway, and without informing the Receiver, the President and CEO of BLIG, Henry Wetelainen, commenced separate discussions with an interested party, Legacy Hill. Mr. Wetelainen claimed in a subsequent affidavit that he pursued these discussions as part of his "continued effort on behalf of BLIG and its creditors, stakeholders, shareholders and affected Aboriginal communities" to rescue BLIG from receivership. On March 12, 2015, BLIG and Legacy Hill entered into a Confidentiality Agreement and BLIG subsequently provided confidential documents to Legacy Hill. The

Receiver was unaware that the parties had signed a Confidentiality Agreement, and of the existence of many of the confidential documents BLIG provided to Legacy Hill.

[9] When the Receiver learned of the discussions between Mr. Wetelainen and Legacy Hill, it notified Mr. Wetelainen that all negotiations with Legacy Hill would be conducted by the Receiver pursuant to the Receivership and the SISP Orders. The Receiver then commenced its own discussions with Legacy Hill and entered into a Confidentiality Agreement with it. It also undertook due diligence on Legacy Hill and provided the results of that due diligence in its Third Report, filed with the court in the insolvency proceedings.

[10] From April to September 2015, the Receiver received no firm proposals or expressions of interest for the restructuring of BLIG or the purchase of its assets. However, on September 30, 2015, Legacy Hill executed a non-binding letter of intent to purchase the assets of BLIG. The sale concluded on November 27, 2015, with the Receiver and Legacy Hill signing the Sale Agreement.

[11] On December 10, 2015, the Receiver moved for approval of the Sale Agreement. It argued that the purchase price represented the best and highest offer for BLIG's assets in a depressed iron ore market. It further argued that the actions of Mr. Wetelainen and BLIG, in undertaking a parallel sales process,

failing to provide confidential documents to the Receiver, and negotiating agreements with Legacy Hill directly, contravened the Receivership Order.

[12] BLIG's secured creditors approved the proposed sale.

[13] BLIG opposed approval of the sale, arguing that the Receiver had shown a lack of impartiality in its conduct with Legacy Hill, that the Receiver had become an advocate for Legacy Hill, and that the Receiver should have made inquiries as to why there had been a parting of the ways between Legacy Hill and BLIG (in a movement away from refinancing/restructuring and toward sale of the assets). BLIG also maintained that, by agreeing to purchase BLIG's assets, Legacy Hill had breached its fiduciary duty to BLIG, its shareholders, stakeholders and Aboriginal communities under the Confidentiality Agreement.

[14] In defence of its conduct, BLIG further argued that, because the Receiver had not been appointed manager of BLIG and did not take possession or control of BLIG's property, Mr. Wetelainen was entitled, on behalf of BLIG, to enter into the Confidentiality Agreement with Legacy Hill and provide the confidential documents in furtherance of a joint venture/restructuring and refinancing of BLIG.

[15] Before the motions judge, BLIG did not pursue its argument that the Receiver had breached its duty to consult with "affected Aboriginal communities". Rather, it argued that the sale should be postponed and that the Receiver should

be required to develop a process to inform creditors, shareholders, stakeholders and “affected Aboriginal communities” of opportunities to participate in the funding of the amount set out in the Sale Agreement.

[16] All parties agreed on the principles to be applied when reviewing a proposed sale by a court-appointed receiver, as set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.). Those principles require that a reviewing court should consider:

> (a) whether the receiver made a sufficient effort to obtain the best price and has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which the offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[17] Applying this framework to the facts of this case, the motions judge granted the Approval and Vesting Order. He made the following critical findings:

> (a) the Receiver had made adequate effort at marketing the property and continued to market the property after the expiry of the bid deadline. The Receiver received no concrete proposals or expressions of interest for a restructuring or sale of BLIG, in what continued to be very depressed market conditions for the mining sector. Legacy Hill’s offer was the only offer made on the property;
>
> (b) although the Receiver owed a duty to all stakeholders, its primary duty was to maximize the

return for the secured creditors. Even with the sale, the secured creditors stood to incur a shortfall on their security. Nevertheless, they supported the sale and did not want to hold out in the hopes of attracting a better offer. While the interest of the debtor must be taken into account, approval of the sale should not be denied, and the modest recovery by the secured lenders jeopardized, on the mere possibility that BLIG could match the Legacy Hill offer. BLIG presented no evidence on the motions that it was able to refinance or restructure the company;

(c) the Receiver negotiated in good faith and had no reason to reject the only offer it received for the property. The court will not lightly interfere with the commercial judgment of a receiver or examine the minutiae of the circumstances leading up to the sale. Provided the Receiver has acted reasonably, prudently and fairly, its decision should be given deference. The speculative nature of BLIG's proposal to be given time to match or better the Legacy Hill offer would adversely affect the integrity of the process undertaken by the Receiver; and

(d) the Receivership Order gave the Receiver broad powers, to the express exclusion of the debtor. Under paragraph 3(g), the Receiver alone had the right to market any and all of the assets, undertakings and properties of BLIG. Under the SISP Order, the Receiver was empowered to solicit offers to purchase, or to invest in, the debtor and/or the property. The SISP Order also contemplated confidentiality agreements between the Receiver and prospective purchasers. Even if the Receiver had been aware of the discussions between BLIG and Legacy Hill about possible refinancing or restructuring, the Receiver was not required to work toward restructuring or refinancing rather than an asset purchase. The SISP Order did not require

> the Receiver to consult with BLIG before finalizing the agreement, nor did any provision of the Receivership Order. Moreover, the Receiver was never presented with a refinancing/restructuring proposal from either BLIG or Legacy Hill, nor did BLIG present any evidence that it was able to refinance the company.

[18] The motions judge also concluded that BLIG's pursuit of refinancing or restructuring without the knowledge or consent of the Receiver was contrary to the provisions of the Receivership and the SISP Orders. He rejected BLIG's submission that, because the Receiver was not appointed manager of BLIG and was not operating the business, Mr. Wetelainen had licence to engage in parallel negotiations with Legacy Hill. In his view, if this submission was accepted, it would result in BLIG working at cross-purposes with the Receiver.

C. PROPOSED ISSUES ON APPEAL

[19] BLIG identifies three proposed issues for argument on appeal:

> (1) Did the motions judge err in law in finding that representatives of BLIG acted in contravention of the Receivership Order?
>
> (2) Does the Receivership Order, which left the management of the company in the hands of existing management, deprive the existing management of the right to seek refinancing and/or restructuring of the company?
>
> (3) Did the motions judge err in approving the Sale Agreement by failing to address the rights of "affected Aboriginal communities"?

D. TEST FOR LEAVE TO APPEAL IN *BIA* PROCEEDINGS

[20] Granting leave to appeal under s. 193(e) of the *BIA* is discretionary and must be approached in a flexible and contextual way. The threshold criterion for granting leave is whether the moving party has raised arguable points that create a reasonable prospect of success on appeal. As Doherty J.A. of this court explained in *Ravelston Corp. (Re)*, 2005 CanLII 63802, at paras. 28-29:

> The inquiry into whether leave to appeal should be granted must […] begin with some consideration of the merits of the proposed appeal. If the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many factors might support the granting of leave to appeal.
>
> A leave to appeal application is not the time to assess, much less decide, ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal. Granting leave to appeal if the merits fall short of even that relatively low bar would be a waste of court resources and would needlessly delay and complicate insolvency proceedings.

[21] In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29, Blair J.A. (In Chambers) incorporated this consideration in proposing a unified approach to granting leave to appeal:

> Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing

> considerations in my view. The court will look to whether the proposed appeal,
>
> (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
>
> (b) is *prima facie* meritorious, and
>
> (c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

[22] At para. 31 of *Pine Tree Resorts,* Blair J.A. explained that, although the "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to in some other decisions of this court, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the evolution of the case law in this area.

[23] Finally, at para. 32, Blair J.A. noted that, given the evolution in the applicable jurisprudence, the test for leave to appeal is not simply merit-based. Rather, it requires a consideration of all the factors set out above.

[24] This articulation of the test has been affirmed on numerous occasions by this and other courts: see *Enroute Imports Inc., Re*, 2016 ONCA 247, at para. 7; *Global Royalties Ltd. v. Brook,* 2016 ONCA 50, at para. 26; *Farm Credit Canada v. Gidda,* 2015 BCCA 236, at paras. 11-12; *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould (Trustee of),* 2013 ONCA 697, at para. 3.

E. ANALYSIS

[25] In our view, the first two proposed grounds of appeal identified by BLIG, which concern the motions judge's findings that BLIG contravened the Receivership Order, do not raise questions requiring consideration by this court. Both grounds involve highly fact-driven issues. The question whether particular conduct contravenes a Receivership Order will be determined by the particular facts of each case. In this case, the motions judge's interpretation and application of specific terms within the Receivership and the SISP Orders, leading him to conclude that BLIG's conduct contravened those terms, are not of general importance to bankruptcy/insolvency practice or the administration of justice as a whole. Rather, his conclusions on this issue were highly fact – and case – specific.

[26] Further, BLIG's materials provide no support for its contention that the motions judge erred in concluding that BLIG's disclosure of confidential information (without the Receiver's knowledge or consent) and withholding information from the Receiver, violated the clear provisions of the Receivership Order. In reaching his conclusion on this issue, the motions judge noted and applied the well-recognized principle that a debtor has a duty to make full and frank disclosure and production of information and documents to the Receiver.

We see no merit to BLIG's challenge to the motion's judge's approach to or his conclusion and reasoning on this issue.

[27] We also see little, if any, merit to BLIG's argument that Mr. Wetelainen had authority to negotiate directly with Legacy Hill. BLIG's reliance on the "indoor management rule" is misplaced. BLIG's actions, in negotiating directly with Legacy Hill and disclosing confidential information to it without first notifying the Receiver, did not reflect standard practices and procedures for a company in receivership. The power to engage in negotiations regarding the company's assets was specifically assigned to the Receiver under the Receivership and the SISP Orders. As the motions judge pointed out, at para. 83, "The fact that the Receiver did not operate the business does not derogate from the exclusivity of the powers that the Receiver was given under the Receivership Order and the SISP Order." We agree.

[28] In any event, the motions judge's reasons reveal that he approved the Sale Agreement based on the totality of the circumstances and application of the factors set out in *Soundair*. His findings about BLIG's conduct had no bearing on those factors and were not part of his assessment whether the Receiver had negotiated fairly and in good faith.

[29] Finally, the proposed appeal would unduly hinder the insolvency proceedings, as Legacy Hill is not prepared to close the Sale Agreement until BLIG has exhausted its appeal rights in this court.

[30] We reach a similar conclusion regarding BLIG's final proposed ground of appeal, namely, that the Receiver breached its duty to consult with "affected Aboriginal communities". In our view, given the history of the proceedings, it is not open to BLIG to now raise this issue on appeal.

[31] There is no question that the Crown (or a Crown agent) has a duty to consult with "affected Aboriginal communities" where the Crown's actions might adversely impact potential or established Aboriginal or treaty rights. In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] S.C.J. No. 69, the Supreme Court indicated that the Crown's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the Honor of the Crown, which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation.

[32] The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. The Supreme Court has also confirmed that the Honor of the Crown cannot be interpreted narrowly or

technically, but must be given full effect in order to promote the process of reconciliation between the Crown and Aboriginal peoples mandated by s. 35(1) of the *Constitution Act, 1982*: *Taku*, at para. 24.

[33] BLIG raised the issue of "affected Aboriginal communities" before Brown J.A. in the context of arguing that it was entitled to leave to appeal in this case as of right under ss. 193 (a), (b) and (c) of the *BIA.* In particular, BLIG argued that the proposed issues on appeal implicate the "future rights" of "affected Aboriginal communities" and other cases of a similar nature, namely, its motion seeking leave to commence an action against the Receiver for damages for the Receiver's alleged breach of its fiduciary duty to Aboriginal peoples.

[34] In concluding that an appeal did not lie as of right under ss. 193(a), (b) or (c) of the *BIA,* and that leave to appeal was required*,* Brown J.A. comprehensively reviewed the evidence placed before the motions judge about "affected Aboriginal communities". He made a number of findings that bear on the issue of BLIG's ability to raise this issue on appeal.

[35] First, and importantly, BLIG did not raise the issue of the Receiver's duty to consult in the context of the SISP proceeding and, in fact, consented to the order allowing the Receiver to proceed with the sale process. At para. 26, Brown J.A. found that the time to raise the issue of the "affected Aboriginal communities" was in the SISP process. We agree.

[36] Second, Brown J.A. held, at para. 35, that BLIG did not advance the argument that the Receiver failed in its duty to consult "affected Aboriginal communities" before the motions judge on the motion to approve the sale. This finding is supported by the record.

[37] Given that the issue was not raised before the motions judge, BLIG is faced with the burden of establishing that all the facts necessary to address this issue are before this court as fully as if the matter had been raised in the court below: *Kaiman v. Graham,* 2009 ONCA 77, at para. 18. BLIG has not discharged this burden.

[38] Specifically, the record before this court does not clearly establish which Aboriginal communities, if any, have interests in the property affected by the sale, the extent and nature of those interests, and how the actions of the Receiver will negatively impact those interests. A clear articulation of the nature and extent of the asserted right is necessary, in the interest of balancing any Aboriginal rights at stake with the rights of others. As Binnie J. noted in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] S.C.J. No. 56, at para. 12:

> At this point in the evolution of Aboriginal rights litigation, the contending parties are generally well resourced and represented by experienced counsel. […] It is true, of course, that Aboriginal law has as its fundamental objective the reconciliation of Canada's Aboriginal and non-Aboriginal communities, and that the

> special relationship that exists between the Crown and Aboriginal peoples has no equivalent to the usual courtroom antagonism of warring commercial entities. Nevertheless, Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as to Aboriginal communities, and to the economic well-being of both. *The existence and scope of Aboriginal rights protected as they are under s. 35(1) […] must be determined after a full hearing that is fair to all the stakeholders*. [Emphasis added.]

[39] In our view, it would be prejudicial and unfair to the interests of BLIG's secured creditors, and contrary to the normal rules of procedure, to permit BLIG to raise this issue at this late stage, when it elected not to raise it in the SISP proceeding or before the motions judge on the motion to approve the sale. As a result of its failure to raise the matter on a timely basis, there is no adequate evidentiary record supporting the claim. Nor does this court have the benefit of the motions judge's consideration and ruling on the issue.

[40] Third, and in any event, we agree with Brown J.A.'s observation that it is doubtful whether BLIG has standing to assert this claim on behalf of Aboriginal communities. As LeBel J. indicated in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] S.C. J. No. 26, at para. 30, the Crown's duty to consult is intended to protect the s. 35 constitutional rights of Aboriginal peoples, which are collective in nature. While an Aboriginal group can authorize an individual or organization to represent it for the purpose of asserting its s. 35 rights, there is no evidence that this occurred in this case.

[41] Moreover, regardless of the standing issue, as the record does not disclose the nature and extent of any Aboriginal community's interests, if any, in BLIG's property, we are unable to conclude that this proposed ground of appeal warrants the granting of leave to appeal.

F. DISPOSITION

[42] For the reasons given, the application for leave to appeal is dismissed. The Receiver is entitled to its costs of this motion and the motion for advice and directions before Brown J.A., fixed in the total amount of $3,000, inclusive of disbursements and all applicable taxes.

"K.M. Weiler J.A."
"E.A. Cronk J.A."
"M.L. Benotto J.A."

TAB 7

COURT OF APPEAL FOR ONTARIO

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

Doherty, Gillese and Lauwers JJ.A.

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

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

BETWEEN

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

Applicants

and

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

Respondents

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

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

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

Alex Cobb, for the respondent Mercer (Canada) Limited

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

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

Heard: February 3, 2015

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

Gillese J.A.:

OVERVIEW

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

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

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

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

wind up of each plan (the "**wind up deemed trust**"). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies' accounts and inventory.

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

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

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

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

> 30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person

> who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

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

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

THE CAST OF CHARACTERS

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

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

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

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

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

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

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

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

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

[19] West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P. (collectively, "**West Face**"), are parties to the **Second Lien Credit Agreement** with the Remaining Applicants. The Second Lien Lenders (including

West Face) are currently the highest ranking secured creditors. West Face is owed approximately $31 million.

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

[21] By endorsement dated March 19, 2015, this court granted the Intervener leave to intervene as a friend of the court: *Re Grant Forest Products Inc.*, 2015 ONCA 192. Under the terms of that endorsement, the Intervener was limited to addressing only those issues already raised on the appeal and to the existing record.

BACKGROUND IN BRIEF

Sale of the Applicants' Assets

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

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

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

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

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

[27] Other than the assets sold to Georgia Pacific, GFPI's only other significant operating asset was a 50% interest in a mill in Alberta. The sale of that interest was approved by court order on January 5, 2011, and closed on February 17,

2011. Additional assets were sold over the following two years, with the final sale closing on November 7, 2012.

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

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

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

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

The Pension Plans

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

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

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

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

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

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

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

The Pension Motion

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

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

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

[42] On the first return date, acting on his own motion, the CCAA judge adjourned the Pension Motion and directed that further notice be given to the

Second Lien Lenders. By endorsement dated June 25, 2012, a term of the adjournment was that no further payments were to be made to the Plans.[1]

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

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

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

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

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

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

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

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

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

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

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

The Bankruptcy Motion

[53] By notice of motion dated October 21, 2012, West Face then brought a motion returnable on October 22, 2012, seeking to be substituted for GE Canada

Leasing Services Company in the outstanding bankruptcy application issued against GFPI. Alternatively, it sought to have the court lift the stay of proceedings in the CCAA Proceeding and permit it to petition the Remaining Applicants into bankruptcy (the "**Bankruptcy Motion**").

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

The Motions are Heard

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

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

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

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

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

The Transition Order

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

> 1. none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to ss. 57(3) and (4) of the PBA;
>
> 2. none of GFPI, the CRO or the Monitor shall make any further payments to the Plans; and
>
> 3. GFPI and each of the other Remaining Applicants are adjudged bankrupt and ordered into bankruptcy.

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

The Appeal

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

THE DECISION BELOW

[62] In his reasons for decision, the CCAA judge observed that through the CCAA Proceeding, the Applicants' assets had been sold in a way that provided the maximum benefit to the widest group of stakeholders. Moreover, some of the

assets were sold on a going concern basis, which provided continued employment and benefits for many. The alternative to the CCAA Proceeding was a bankruptcy proceeding, which might well have resulted in a greater loss of employment and a lower level of recovery for secured creditors.

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

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

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

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

[67] The CCAA judge also rejected the argument that the CCAA court, in authorizing the wind up of the Plans, had given the wind up deemed trusts

priority in the insolvency regime. He noted that the orders authorizing the wind ups explicitly state that they do not affect or determine the priority or security of the claims against those funds, and the orders say nothing in respect of the deemed trust issue.

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

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

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

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

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

A SUMMARY OF THE PARTIES' POSITIONS ON APPEAL

The Superintendent

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

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

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

The Administrator

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

[77] First, the Administrator says that the CCAA judge erred by failing to answer the question posed by the Pension Motion, namely, whether GFPI should be relieved from making further payments into the Plans. It submits that the test GFPI had to meet to obtain such relief is: could GFPI make the required

payments without jeopardizing the restructuring? Instead of answering that question, the Administrator says that the CCAA judge asked and answered this question: can a wind up deemed trust be created during the pendency of a stay of proceedings? The Administrator contends that the CCAA judge erred in recasting the Pension Motion in this way because the creation of a wind up deemed trust and the obligation to make special payments are two separate concepts. It submits that the existence of a deemed trust has no bearing on whether a CCAA court should grant a debtor relief from the obligation to make special pension payments.

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

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

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

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

The Remaining Applicants

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

West Face

[83] West Face maintains that the core issue to be decided on this appeal is whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering GFPI into bankruptcy. It says that if this court accepts

that the CCAA judge made no error in ordering GFPI into bankruptcy, without first requiring payment of the pension claims, the issues raised by the Superintendent are moot.

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

The Monitor

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

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

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

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

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

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

The Intervener

[87] The Intervener's position is that:

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

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

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

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

THE ISSUES

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

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

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

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

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

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

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

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

[93] With these parameters in mind, it appears to me that the question which must be answered to decide this appeal and resolve the dispute between the parties is: did the CCAA judge err in lifting the stay and ordering the Remaining

Applicants into bankruptcy without first requiring that the wind up deemed trusts deficits be paid in priority to the Second Lien Lenders?

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

1. what standard of review applies to the CCAA judge's decision to lift the CCAA stay of proceedings and order the Remaining Applicants into bankruptcy?
2. did the CCAA judge make a procedural error in his treatment of the Pension Motion? and
3. did the CCAA judge err in principle, or act unreasonably, in lifting the stay and ordering the Remaining Applicants into bankruptcy?

THE STANDARD OF REVIEW

[95] The Superintendent submits that the standard of review of a decision made under the CCAA is correctness with respect to errors of law, and palpable and overriding error with respect to the exercise of discretion or findings of fact. As authority for this submission, the Superintendent relies on *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, 261 A.R. 120, at para. 29.

[96] I would not accept this submission for two reasons.

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

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

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

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

DID THE CCAA JUDGE MAKE A PROCEDURAL ERROR?

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

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

[103] It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The

CCAA judge must "provide the conditions under which the debtor can attempt to reorganize" (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge "must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors" (para. 60).

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

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

because there would have been even fewer funds available to satisfy their claims.

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

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

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

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

DID THE CCAA JUDGE ERR IN PRINCIPLE OR ACT UNREASONABLY IN LIFTING THE STAY AND ORDERING THE REMAINING APPLICANTS INTO BANKRUPTCY?

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

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

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

> … The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow

> the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco,* at paras. 62-63). [Citation excluded.]
>
> …
>
> [T]he comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA.* The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*. [Emphasis added.]

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

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

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

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

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

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

1. West Face's Conduct

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

[116] Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second

Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

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

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

2. The Wind up Deemed Trusts

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

are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that *Indalex* requires that the wind up deemed trusts be given priority in this case.

[120] I would not accept either submission.

Federal Paramountcy

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

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

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

Indalex

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

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

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

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

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

application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.

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

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

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

[132] The issues for resolution in *Indalex* were whether: the deemed trust in s. 57(4) applied to wind up deficiencies; such a deemed trust superseded a DIP

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

charge; the company had fiduciary obligations to the pension plan members when making decisions in the context of insolvency proceedings; and, a constructive trust was properly imposed as a remedy for breach of fiduciary duties.

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

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

3. Steps by the Pension Claimants

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

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

> [94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an

> insolvent company GFPI was not obliged to make the payments … .
>
> [95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA.* Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made.

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

[138] Understood in this way, I see no error in the CCAA judge's reasoning. I would add that the timing of the relevant events supports this reasoning. When the Initial Order was made, the Plans were on-going – the Superintendent's Wind Up Orders were not made until almost three years later. The Initial Order

permitted, but did not require, GFPI to pay "all outstanding and future … pension contributions … incurred in the ordinary course of business". The nature and magnitude of contributions to ongoing pension plans is different from those made to pension plans in the process of being wound up. Thus, it does not seem to me that payments made on wind up deficits fall within the terms of the Initial Order which permitted the making of pension contributions "incurred in the ordinary course of business".

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

4. The Question Posed by the Pension Motion

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

[141] In ordering the Remaining Applicants into bankruptcy, the CCAA judge found that there was no point to continuing the CCAA Proceeding. It was plain and obvious that there were insufficient funds to meet the claims against the Remaining Funds. Accordingly, there was no need for the CCAA judge to

address the question posed by the Pension Motion because distribution of the Remaining Funds had to be in accordance with the BIA priorities scheme.

A CONCLUDING COMMENT

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

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

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

[145] Third, the CCAA Proceeding gave GFPI sufficient "breathing space" to enable it to take steps to ensure that the Plans continued to be properly administered. This is best seen from the orders dated August 26, 2011, and September 21, 2011. Through those orders, GFPI was authorized to initiate the Plans' windups and work with the Superintendent in appointing a replacement administrator, and the Monitor was authorized to hold back funds against which

the pension claimants could assert their claims. Co-operation of this sort typically leads to reduced costs of administration with the result that more funds are available to plan beneficiaries.

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

DISPOSITION

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

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

Released: August 7, 2015 "DD"

"E.E. Gillese J.A."
"I agree Doherty J.A."
"I agree P. Lauwers J.A."

Schedule A

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

SERVICE

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

CAPITALIZED TERMS

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

APPROVAL OF ACTIVITIES

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

EXTENSION OF STAY PERIOD

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

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

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

TAB 8

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, and in the Matter of a Plan or Plans of Compromise or Arrangement of Ivaco Inc. et al.

[Indexed as: Ivaco Inc. (Re)]

83 O.R. (3d) 108

Court of Appeal for Ontario,
Laskin, Rosenberg and Simmons JJ.A.
October 17, 2006

Debtor and creditor -- Companies' Creditors Arrangement Act -- Pensions -- Monitor appointed under CCAA not having fiduciary duty to debtor Company's pension plan beneficiaries -- Company or Monitor not having duty under Pension Benefits Act to keep unpaid contributions to pension plan in separate account -- Motions judge not required by CCAA to order that amount of deemed trust under Pension Benefits Act for unpaid contributions be paid at end of CCAA proceedings but before bankruptcy -- No gap existing between CCAA and Bankruptcy and Insolvency Act in which provincial deemed trusts can be executed -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

Debtor and creditor -- Companies' Creditors Arrangement Act -- Powers of court -- Motions judge ordering transfer of debtor Companies' head offices from Qubec to Toronto -- CCAA not giving motions judge authority to order transfer -- Motions judge not having to resort to CCAA because he had express authority to order transfer under s. 191 of Canada Business Corporations Act -- Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 191 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. [page109]

Pensions -- Monitor appointed under Companies' Creditors Arrangement Act not having fiduciary duty to debtor Company's pension plan beneficiaries -- Company or Monitor not having duty under Pension Benefits Act to keep unpaid contributions to pension plan in separate account -- Motions judge not required by CCAA to order that amount of deemed trust under Pension Benefits Act for unpaid contributions be paid at end of CCAA proceedings but before bankruptcy -- No gap existing between CCAA and Bankruptcy and Insolvency Act in which provincial deemed trusts can be executed -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 -- Pension Benefits Act, R.S.O. 1990, c. P.8.

In 2003, the Companies sought and obtained court-ordered protection under the Companies' Creditors Arrangement Act ("CCAA"). In order to avoid imperiling the possibility of restructuring, a pension stay order was granted, and the Companies were relieved from making past service contributions or special payments to the underfunded non-union pension plans during the CCAA stay. Paragraph 4 of the pension stay order stipulated that the Companies would not incur any obligation because of the failure to make these past service contributions and special payments during the stay period. Paragraph 5 of the pension stay order recognized that statutory deemed trusts, liens or other charges might arise because the Companies were relieved from paying past service contributions, but that they would not have priority over the charges in the initial stay order. The Companies were unable to restructure, and their assets were sold. The employees and retirees in the underfunded non-union pension plans, claiming under the deemed trust and lien provisions of the Pension Benefits Act (the "PBA"), sought to recover unpaid contributions to the plans outside of bankruptcy. The Companies' financial and trade creditors wished to put the Companies into bankruptcy. Provincial deemed trusts do not enjoy priority under the Bankruptcy and Insolvency Act (the "BIA"). The Superintendent of Financial Services, representing the employees and retirees, brought a motion for an order that part of the sale proceeds be used to satisfy the unpaid past service and special contributions which the Companies were deemed to hold in trust for the beneficiaries of

the pension plans under the PBA, or alternatively, an order segregating that amount in a separate account. Two of the Companies' lenders brought motions for an order lifting the stay under the CCAA and petitioning the Companies into bankruptcy. The motions judge dismissed the Superintendent's motion, lifted the stay and permitted the bankruptcy to proceed, but did not put the Companies into bankruptcy. To facilitate the bankruptcy petitions, the motions judge ordered that the head offices of two of the Companies be transferred from cities in Qubec to Toronto. The Superintendent appealed.

Held, the appeal should be dismissed.

The motions judge did not err in failing to order immediate payment of the amount of the deemed trusts under the PBA or in failing to segregate this amount in a separate account. The motions judge was not required in law to order the segregation of the amount of the deemed trusts during the CCAA proceeding. The language of s. 57 of the PBA does not require the employer to keep its unpaid contributions to a pension plan in a separate account. Moreover, the Superintendent's argument amounted to an impermissible collateral attack on para. 4 of the pension stay order. The Monitor appointed under the CCAA did not stand in the shoes of the Companies and did not have a fiduciary duty to the pension beneficiaries. The motions judge was not required in law to order that the amount of the deemed trust be paid at the end of the CCAA proceedings but before bankruptcy. [page110] The CCAA itself did not require the motions judge to execute the deemed trusts. Moreover, absent an agreement, it was doubtful that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, it was questionable whether the court had any authority to order a distribution of the sale proceeds. The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rested on the proposition that a gap exists between the CCAA and the BIA in which the provincial deemed trusts can be executed. That is not the case. There is no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. 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.

The motions judge's order lifting the stay and permitting the bankruptcy petitions to proceed was a discretionary order. Appellate review of a discretionary order under the CCAA is limited. The motions judge did not exercise his discretion improperly by ignoring the unfair and prejudicial effects of his order on the pension beneficiaries. Numerous considerations supported the motions judge's decision to lift the stay and permit the bankruptcy petitions to proceed. He exercised his discretion properly.

While the CCAA did not give the motions judge jurisdiction to order the transfer of the head offices of two of the Companies from Qubec to Toronto, the motions judge did not need to resort to the CCAA because he had express authority to order the transfer in s. 191 of the Canada Business Corporations Act.

Cases referred to

GMAC Commerical Credit Corp. - Canada v. TCT Logistics Inc. (2005), 74 O.R. (3d) 382, [2005] O.J. No. 589, 194 O.A.C. 360, 7 C.B.R. (5th) 202 (C.A.); Toronto-Dominion Bank v. Usarco Ltd., [1991] O.J. No. 1314, 42 E.T.R. 235 (Gen. Div.), distd

Other cases referred to

Abraham v. Canadian Admiral Corp. (Receiver of) (1998), 39 O.R. (3d) 176, [1998] O.J. No. 1298, 158 D.L.R. (4th) 65, 37 C.C.E.L. (2d) 276, 2 C.B.R. (4th) 243 (C.A.) [Leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 276] (sub nom. Abraham v. Coopers and Lybrand Ltd.); Air Canada (Re) (2003), 66 O.R. (3d) 257, [2003] O.J. No. 2976, 229 D.L.R. (4th) 687, 43 C.B.R. (4th) 1 (C.A.), supp. reasons [2003] O.J. No. 3943, 45

C.B.R. (4th) 23 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.); Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 36 B.C.L.R. (2d) 118, 57 D.L.R. (4th) 623, [1989] 4 W.W.R. 566, 73 C.B.R. (N.S.) 273 (C.A.); Beatrice Foods Inc. (Re), [1996] O.J. No. 5495, 43 C.B.R. (4th) 10 (C.J.); British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78, 38 B.C.L.R. (2d) 145, 59 D.L.R. (4th) 726, 97 N.R. 61, [1989] 5 W.W.R. 577, 75 C.B.R. (N.S.) 1, 34 E.T.R. 1; Buth-na-bodhiaga, Inc. v. Lambert (2002), 60 O.R. (3d) 787, [2002] O.J. No. 3163, 216 D.L.R. (4th) 330, 36 C.B.R. (4th) 256 (C.A.), supp. reasons [2002] O.J. No. 3664, 36 C.B.R. (4th) 269 (C.A.); Dallas/North Group Inc. (Re), [2001] O.J. No. 2743, 27 C.B.R. (4th) 40 (C.A.), affg (1999), 46 O.R. (3d) 602, [1999] O.J. No. 5744, 17 C.B.R. (4th) 56 (Gen. Div.); General Chemical Canada Ltd. (Re), [2005] O.J. No. 5436, 51 C.C.P.B. 297, 144 A.C.W.S. (3d) 405 (S.C.J.); Harrop of Milton Inc. (Re) (1979), 22 O.R. (2d) 239, [1979] O.J. No. 4015, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289 (S.C.); [page111] Husky Oil Operations Ltd. v. Canada (Minister of National Revenue), [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77, 26 O.R. (3d) 81, 137 Sask. R. 81, 128 D.L.R. (4th) 1, 188 N.R. 1, 107 W.A.C. 81, [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1; Royal Crest Lifecare Group Inc. (Re), [2004] O.J. No. 174, 46 C.B.R. (4th) 126 (C.A.); Stelco Inc. (Re) (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 9 C.B.R. (5th) 135, 2 B.L.R. (4th) 238 (C.A.); United Maritime Fishermen Co-op (Re), [1988] N.B.J. No. 308, 87 N.B.R. (2d) 333, 221 A.P.R. 333, 68 C.B.R. (N.S.) 170 (Q.B.)

Statutes referred to

Bank Act, S.C. 1991, c. 46, s. 427 [as am.]
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 43 [as am.], 67 [as am.]
Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 109 [as am.], 173 [as am.], 191 [as am.]
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2 "debtor company" [as am.], 11 [as am.], 11.7 [as am.], 13 [as am.]

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 57
Pension Benefits Act, 1987, S.O. 1987, c. 35
Truck Transportation Act, R.S.O. 1990, c. T.22
Wage Earner Protection Program Act, S.C. 2005, c. 47 [not yet in force]

Rules and regulations referred to

Load Brokers, O. Reg. 556/92 ("Truck Transportation Act"), s. 15

Authorities referred to

Gillese, E.E., The Fiduciary Liability of the Employer as Pension Plan Administrator (Toronto: The Canadian Institute, November 1996)

APPEAL from the three orders of Farley J. of the Superior Court of Justice, [2005] O.J. No. 3337, 12 C.B.R. (5th) 213 (S.C.J.).

Frederick L. Myers and Jason Wadden, for appellant The Superintendent of Finance Services (Ontario).

Andrew Hatnay, for respondent Qubec Pension Committee of Ivaco Inc.

Jeffrey S. Leon and Richard B. Swan, for respondent National Bank of Canada.

Dan V. MacDonald, for respondent Bank of Nova Scotia.

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

Robert W. Staley and Evangelia Kriaris, for respondent Informal Committee of Noteholders.

Peter F.C. Howard, for Monitor Ernst & Young Inc.

The judgment of the court was delivered by

LASKIN J.A.: --

A. Introduction

[1] This appeal arises out of a priorities dispute between two groups of creditors of an insolvent company, Ivaco Inc., and its [page112] related group of companies. The dispute is over the sale proceeds of the assets of Ivaco. On one side of the dispute are the employees and retirees in Ivaco's underfunded non-union pension plans. They claim under the deemed trust and lien provisions of Ontario's Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 57(3), (4) ("PBA"), and seek to recover unpaid contributions to the plans outside of bankruptcy. On the other side of the dispute are Ivaco's financial and trade creditors. They wish to put Ivaco into bankruptcy in order to take advantage of the scheme of distribution under the federal Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"). The dispute arises because provincial deemed trusts do not, by virtue of that legislative designation, enjoy priority under the federal bankruptcy statute.

[2] Ivaco and its related group of companies (collectively the "Companies") became insolvent in 2003. In September 2003, the Companies sought and obtained court-ordered protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). All claims of creditors were stayed. A later order stayed the Companies' obligation to pay the outstanding past service contributions and special payments to the non-union pension plans. (Past service contributions are moneys due to fund benefits or benefit enhancements for pension members' past service; special payments are extraordinary payments made because a pension plan is underfunded.)

[3] The main purpose of CCAA proceedings is to facilitate the restructuring of an insolvent company so that it may stay in business. The Companies, however, were unable to restructure.

In late 2004, virtually all of their assets were sold. All that remains is a pool of money: the proceeds of sale. All that remains to be done is to distribute this pool of money among the creditors.

[4] The Superintendent of Financial Services, representing the employees and retirees, brought a motion for an order that part of the sale proceeds be used to satisfy the unpaid past service and special contributions, which the Companies are deemed to hold in trust for the beneficiaries of the pension plans under the PBA. Alternatively, the Superintendent sought an order segregating this amount in a separate account. The Qubec Pension Committee ("QPC"), the administrator of the largest non-union plan, supported the Superintendent's motion. Two of the Companies' lenders, the Bank of Nova Scotia and the National Bank, brought motions for an order lifting the stay under the CCAA and petitioning the Companies into bankruptcy.

[5] Farley J., who had supervised these CCAA proceedings for over two and a half years, heard all three motions. By order dated July 18, 2005, he dismissed the Superintendent's motion [page113] and partly granted the banks' motions. He lifted the stay and permitted the bankruptcy petitions to proceed, but he did not put the Companies into bankruptcy.

[6] The Superintendent appeals. She argues that the motions judge erred either in law or in the exercise of his discretion. The Superintendent submits that the motions judge erred in law by failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount. The Superintendent contends that the PBA legally required that the deemed trusts for unpaid past service contributions and special payments be executed or protected before bankruptcy.

[7] Alternatively, the Superintendent submits that the motions judge erred by exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed without first protecting the claims of the pension beneficiaries. The Superintendent contends that the motions judge exercised his discretion on a wrong principle because he ignored the unfairness and prejudice to the Companies' most

vulnerable creditors.

[8] The Superintendent also appeals an ancillary order made by the motions judge. To facilitate the bankruptcy petitions, the motions judge ordered that the head offices of two of the Companies be transferred from cities in Qubec to Toronto. The Superintendent and the QPC submit that the motions judge had no jurisdiction under the CCAA to do so, or alternatively, improperly exercised his discretion in doing so.

[9] This court granted leave to appeal under s. 13 of the CCAA. The court also stayed the two orders in favour of the banks pending the disposition of the appeal.

B. Relevant Facts and Chronology

(a) The Companies

[10] Six related corporations were granted protection under the CCAA: Ivaco Inc., Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc., Docap (1985) Corporation, Florida Sub One Holdings Inc. and 3632610 Canada Inc. Four of these corporations -- Ivaco, IRM, Ifastgroupe and Docap -- established the non-union pension plans in issue on this appeal.

[11] Ivaco, IRM and Ifastgroupe ceased operations after their assets were sold. Only Docap now has any operating assets. Its assets consist mainly of inventory and accounts receivable that have not yet been sold. Docap is a small entity. Neither restructuring it nor selling it as a going concern seems a viable option. The National Bank, Docap's principal secured creditor, wishes to put the company into bankruptcy and liquidate its assets. [page114]

(b) The non-union pension plans

[12] The Companies had both a unionized and non-unionized workforce. They established various registered pension plans for their employees. These included four non-union plans: the Ivaco Salaried Plan, which is registered in Qubec and has both

Qubec and Ontario members, the Designated Employees Plan, the Ingersoll Plan and the Docap Plan, all registered in Ontario.

[13] The QPC administers the Ivaco Salaried Plan, which is the largest of the four plans. Ivaco formerly administered the other three plans. However, the Superintendent appointed PricewaterhouseCoopers Inc. as administrator of the Designated Employees Plan and the Ingersoll Plan. A former Ivaco employee administers the Docap Plan for Ivaco.

(c) The initial stay under the CCAA

[14] After their operations became financially troubled, the Companies sought and were granted protection from their creditors under the CCAA. On September 16, the motions judge granted a comprehensive stay of all creditor claims up to that time. He appointed Ernst & Young Inc. as Monitor. As a result of the stay, debts of the Companies existing on the date of the initial stay order have not been paid.

[15] During the CCAA proceedings the Companies continued to pay the wages and benefits of all active employees. The Companies also continued to pay their current contributions to their various pension plans.

(d) The pension stay order

[16] When the Companies began CCAA proceedings, the non-union pension plans were underfunded. Before the initial stay order the Companies had been making both special payments and past services contributions to rectify this underfunding. Under the PBA, past service contributions accrue daily and are to be paid monthly.

[17] Early in the CCAA proceedings, the Monitor concluded that the Companies would jeopardize their ability to restructure if they were required to continue making past service contributions and special payments. Because of the magnitude of these payments, the creditors would not agree to permit the DIP (debtor in possession) loan to be used for funding the pension plans. In their view, and in the view of

the Monitor, doing so would imperil the possibility of restructuring. Relying on the Monitor's opinion, the Companies sought, and on November 28, 2003, were granted a pension stay order. [page115]

[18] The motions judge relieved the Companies from making past service contributions or special payments to the underfunded non-union pension plans during the CCAA stay. No interested party, including both the Superintendent and the QPC, opposed the order. All parties thought that relieving the Companies from making these payments would assist their restructuring efforts. The Companies still remained obligated to make current contributions to the non-union plans.

[19] Paragraph 4 of the pension stay order stipulated that none of the Companies would incur any obligation because of the failure to make these past service contributions and special payments during the stay period:

> 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.

[20] Paragraph 5 of the pension stay order expressly recognized that statutory deemed trust, liens or other charges may arise because the Companies were relieved from paying past service contributions but that they would not have priority over the charges in the initial stay order:

> 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.

[21] Paragraph 6 of the order recognized that the pension stay did not compromise the Companies' obligations under their non-union pension plans:

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.

(e) The sale to Heico

[22] As the Companies were unable to restructure, they began to pursue a second option: selling their assets in a going [page116] concern sale. On August 18, 2004, the motions judge approved the sale of the assets of Ivaco, Ifastgroupe and IRM to the Heico Companies. As part of the transaction, the purchaser hired the Companies' unionized workforce and assumed the Companies' obligations to their unionized pension plans. The purchaser also hired almost all of the Companies' non-unionized workforce, but it was unwilling to assume the Companies' obligations to the four non-union pension plans. These obligations remained with the Companies.

[23] Nonetheless, the Monitor supported the sale. In the Monitor's view, the sale gave the creditors and workers greater recovery and benefits than they would obtain in either a bankruptcy or a liquidation. Again, no party, including both the Superintendent and the QPC, opposed the sale.

[24] The motions judge made two orders -- on August 18, 2004 and November 30, 2004 -- vesting the assets in the purchaser.

These orders expressly preserved all claims that might have been made against the assets by providing that these claims could be made against the sale proceeds. In accordance with these orders, the Monitor is holding the sale proceeds in various trust accounts.

[25] In December 2004, Ivaco, IRM and Ifastgroupe wound-up their non-union pension plans. Under the PBA, they are obligated to fund the wind-up liabilities of these plans.

(f) The pension claims

[26] The Companies' non-union pension plans have been severely underfunded and the deficit has increased during the stay period. At the beginning of the CCAA proceedings in September 2003, unpaid past service contributions to the non-union plans totalled about $1.4 million and the solvency deficiency amounted to approximately $11.1 million. By December 2004, these figures had grown to approximately $11.6 million and $29.1 million respectively. They continued to grow while the pension stay order remained in place.

[27] The potential loss of benefits for each pensioner is significant. Counsel for the Superintendent advised the court that the average pensioner in the non-union plans is 67 years old and earns a pension of $14,000 per year. These pensioners will receive their full pension only if the full wind-up deficit is paid. For example, if the plans do not recover the past service contributions suspended by the pension stay order, the average monthly pension will be reduced by 26 per cent from approximately $1,200 to $888. If only unpaid contributions are recovered, and not the full [page117] solvency deficiency, the average pension will be reduced by 17 per cent to $996 monthly.

(g) The claims of the financial creditors

[28] The outstanding claims of the financial creditors of the Companies are also significant. We were told that the sale proceeds of the Companies' assets are insufficient to satisfy all claims, and are certainly insufficient to satisfy the unsecured claims.

[29] The Bank of Nova Scotia was the lender to IRM. By October 2003, IRM owed the Bank about $40 million. IRM had ceased to meet its liabilities generally as they became due, and had given notice to its creditors that it had suspended payment of its debts. On October 3, 2003, the Bank issued a petition for a receiving order against IRM. The issuance of the petition was permitted by the initial stay order, but that proceeding was otherwise stayed. The order under appeal lifted the stay and permitted the Bank of Nova Scotia to proceed with its petition.

[30] The National Bank lent money to Ivaco, Ifastgroupe and Docap. As of March 2005, it had a secured claim against Ivaco for $17 million, [See Note 1 below] and against Docap for $55,622 U.S. and $4.2 million Canadian. It also had an unsecured claim against Ifastgroupe for $45.5 million Canadian. Ifastgoupe is also indebted to La Caisse for $14.9 million.

[31] A large number of other creditors also have claims against the Companies: Ivaco has 792 creditors with claims totalling $554.9 million; Docap has 82 creditors with claims totalling $111.1 million; and Ifastgroupe has 645 creditors with claims totalling $253.3 million.

C. Analysis

(a) What is in issue on this appeal

[32] The scope of this appeal is quite narrow. There are three issues:

(1) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts under the PBA or in failing to segregate this amount in a separate account?

(2) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions [page118] to proceed, without protecting the claims of the pension beneficiaries?

(3) Did the motions judge err in law or in the exercise of his discretion by ordering the transfer of Ivaco's and Ifastgroupe's head offices from Qubec to Toronto?

(b) What is not in issue on this appeal

[33] There are also three issues raised by the parties that do not need to be decided on this appeal: (1) whether, outside of bankruptcy, the deemed trusts under the PBA have priority over the Bank of Nova Scotia's security under s. 427 of the Bank Act, S.C. 1991, c. 46; (2) whether the Superintendent can show "sufficient cause" under s. 43(7) of the BIA to deny the application for a bankruptcy order; and (3) whether the deemed trusts under the PBA also meet the requirements for a common law trust and thus on bankruptcy should be excluded from the property of the Companies under s. 67(1)(a) of the BIA.

[34] On my view of the appeal, the first of these issues does not have to be resolved. It may become relevant at the bankruptcy hearing, and, if so, should be dealt with by the bankruptcy judge. See Abraham v. Canadian Admiral Corp. (Receiver of) (1998), 39 O.R. (3d) 176, [1998] O.J. No. 1298 (C.A.). The second and third issues, I assume, will be dealt with at the hearing of the bankruptcy petitions. Admittedly, the motions judge made some observations on these two issues. However, he also said, at para. 20 of his reasons, that he was not deciding either one:

> 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.

[35] In their written and oral submissions, the Superintendent and the QPC argued that some of the motions

judge's general observations on these issues were wrong. I do not propose to consider these arguments because, as the motions judge recognized, they should be addressed at the hearing of the bankruptcy petitions. Instead, I will make a few brief observations of my own.

[36] In my view, the motions judge appropriately considered what would likely happen at the bankruptcy hearing. He did so because the likely implications of lifting the stay were relevant considerations to the exercise of his discretion. [page119]

[37] The motions judge observed, at para. 14, that the discretion to refuse to make a bankruptcy order under s. 43(7) typically is exercised in two categories of cases: where the petitioner has an ulterior motive in seeking the order, or where the order would not serve any meaningful purpose. This observation reflects the current state of the case law under s. 43(7). See for example Re Dallas/North Group Inc. (1999), 46 O.R. (3d) 602, [1999] O.J. No. 5744 (Gen. Div.); Buth-na-bodhiaga, Inc. v. Lambert (2002), 60 O.R. (3d) 787, [2002] O.J. No. 3163 (C.A.). Although the motions judge added that the Superintendent's claim does not appear to come within either category, he left the final determination of that question for the bankruptcy judge.

[38] The motions judge also observed, at para. 11 of his reasons, that a provincially created deemed trust does not by that fact alone enjoy priority under the BIA. This is not a contentious proposition. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute. See for example British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, [1989] S.C.J. No. 78; Husky Oil Operations Ltd. v. Canada (Minister of National Revenue), [1995] 3 S.C.R. 453, [1995] S.C.J. No. 77. Indeed, it is this jurisprudence that undoubtedly prompted the Superintendent's original motion and appeal to this court.

[39] The motions judge also correctly observed, at para. 11 of his reasons, that a provincial deemed trust will retained

its priority in bankruptcy only if it also meets the three attributes -- the three certainties -- of a common law trust: certainty of intent; certainty of subject matter; and certainty of object. Only a trust that has these three attributes is a "true trust" that will be exempt from the bankrupt's estate under s. 67(1)(a) of the BIA. See for example Henfrey Sampson, supra. Whether the Superintendent can establish a true trust for unpaid past service contributions, even though the proceeds of the Heico sale have been commingled, will be decided at the bankruptcy hearing.

[40] I now turn to the issues that do arise on this appeal.

(c) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount?

[41] The Superintendent's principal submission is that the motions judge erred in law in failing to order payment of the amount of the deemed trusts before bankruptcy or in failing to order the Monitor to segregate this amount during the CCAA [page120] proceedings. The submission that the motions judge was legally required to order payment or segregation of the amount of the deemed trusts was not advanced before him. The Superintendent advanced this submission for the first time in this court. I do not agree with it.

[42] I will deal first with whether the motions judge should have required the Monitor, Ernst & Young, to segregate the amount of the deemed trusts. The Superintendent contends that the Companies, and in their place the Monitor, had a statutory and fiduciary obligation to segregate. As the Monitor was an officer of the court, the motions judge should have compelled it to fulfill these duties. This contention faces three obstacles: the language of the PBA; the terms of the pension stay order; and the status and role of the Monitor.

[43] The deemed trusts for unpaid past service and special contributions are found in s. 57(3) and (4) of the PBA. Subsection (3) is the basic provision that creates a deemed trust for unpaid employer contributions. Subsection (4)

stipulates that on the wind-up of a pension plan, employer contributions accrued but not yet due because of the timing of the wind-up are also deemed to be held in trust:

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

[44] At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in Toronto-Dominion Bank v. Usarco Ltd., [1991] O.J. No. 1314, 42 E.T.R 235 (Gen. Div.), Farley J. said, at para. 25, that the equivalent legislation then in force under the Pension Benefits Act, 1987, S.O. 1987, c. 35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in Usarco is correct, but I do not need to resolve the issue on this appeal.

[45] Under s. 57(5) of the PBA, the plan administrator has a lien and charge on the assets of the employer for the amount of any deemed trust. The lien and charge permit the administrator to enforce the deemed trust.

> 57(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). [page121]

[46] The Superintendent argues that these provisions required the Companies, and in their place the Monitor, to keep the unpaid contributions in a separate account. However, the

language of s. 57 does not require the employer to hold the contributions separately. A "deemed trust" is, in a sense, a legal fiction. Outside of bankruptcy it does create a priority for pension contributions, a priority that would not exist but for the designation. Yet, as I have already said, this legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account it must legislate that separation. It has not done so.

[47] The Superintendent argues that the pension stay order supports her position because para. 5 [of] the order, supra, recognized that a deemed trust for unpaid contributions may arise during the stay period and that para. 6 of the stay order, supra, did not compromise the Companies' obligation to make these contributions. This argument fails to take account of para. 4 of the pension stay order. Paragraph 4 stipulates that during the stay the Companies will not incur any obligation -- statutory, fiduciary or otherwise -- for failing to make contributions to the plan. In my view, the Superintendent's argument amounts to an impermissible collateral attack on para. 4 of the pension stay order.

[48] The Superintendent also tries to buttress her position by arguing that the Monitor stands in the shoes of the Companies, and like the Companies, has a fiduciary duty to the pension beneficiaries. I disagree.

[49] The Monitor was appointed under s. 11.7(1) of the CCAA to "monitor the business and financial affairs" of the Companies, and was given the functions set out in s. 11.7(3) of that statute: to examine the Companies' property, report to the court on the Companies' business and financial affairs and keep the creditors informed. Although the motions judge gave the Monitor additional powers, they were limited. The Monitor was given authority to deal with day-to-day administrative matters, to finalize the sale to Heico and to receive and control the proceeds of sale. I do not think it can be fairly said that the Monitor "stands in the shoes of the Companies".

[50] Equally important, the Monitor does not owe a fiduciary

duty to the pension beneficiaries. The Superintendent's attempt to impose an obligation on the Monitor to segregate the contributions to the non-union plans depends at least on establishing that the Monitor acts as a fiduciary of the employees in those plans. Both the role of the Monitor and the initial stay order preclude the Superintendent's assertion. [page122]

[51] Pension plan administrators do owe a fiduciary duty to plan members. See E.E. Gillese, The Fiduciary Liability of the Employer as Pension Plan Administrator (Toronto: The Canadian Institute, November 18, 1996, pp. 1-25). But the Monitor was not given that role. It is not an administrator of any of the four non-union plans. Indeed, the Superintendent never asked the court to give the Monitor responsibility for administering these plans.

[52] Moreover, para. 59 of the initial stay order expressly states that the Monitor is not to be considered either a successor or related employer.

> THIS COURT ORDERS that nothing in this Order shall result in the Monitor being or being deemed or considered to be a successor or related employer, sponsor or payor with respect to any Applicant or any employees or former employees of any Applicant under any legislation, including ... the Pension Benefits Act (Ontario) ... or under any other provincial or federal legislation, regulation or rule of law or equity applicable to employees or pensions, or otherwise.

(Emphasis added)

As the Monitor was neither a plan administrator nor a successor employer, it can owe no fiduciary duty to the members of the four plans.

[53] Therefore, the combination of the wording of s. 57 of the PBA, para. 4 of the pension stay order and the limited role of the Monitor, refute the Superintendent's segregation argument. The Superintendent, however, submits that two cases, the decision of this court in GMAC Commercial Credit Corp.

-- Canada v. TCT Logistics Inc. (2005), 74 O.R. (3d) 382, [2005] O.J. No. 589, and an earlier decision of the motions judge in Usarco, supra, support the argument for segregation. In my view, both cases are distinguishable.

[54] In TCT Logistics, this court held that an interim receiver, who was both an officer of the court and stood in the shoes of the debtor, had a statutory duty under the legislation then in force, s. 15 of the Load Brokers regulation, O. Reg. 556/92 (passed under the Truck Transportation Act, R.S.O. 1990, c. T.22) to hold carriers' fees that it had collected in a separate trust account. TCT Logistics and this case differ in three critical ways.

[55] First, the interim receiver in TCT Logistics was not just an officer of the court, it stood in the place of the debtor company. Here, although the Monitor is an officer of the court, it does not stand in the place of the Companies. For the reasons outlined in para. 49 its role is far more limited.

[56] Second, in TCT Logistics the court order authorized the interim receiver to hold the carriers' fees in a separate bank account until entitlement to that money was decided. Here, the [page123] pension stay order prohibited the Companies from making any past service or special contributions during the stay period.

[57] Third, and perhaps most important, the applicable legislation in TCT Logistics, s. 15(2) of the Load Brokers regulation required the debtor company to maintain a separate trust account and to keep the fees it collected for the carriers in that account. Here, s. 57 of the PBA does not similarly require an employer to keep its unpaid contributions in a separate trust account. Moreover, in TCT Logistics, despite s. 15(2) of the regulation, this court held that the carrier fees previously collected by the debtor company lost their character as trust money because they had been commingled with other funds. TCT Logistics thus does not support the Superintendent's position.

[58] In Usarco, supra, at para. 16, Farley J. commented that

the deemed trust provisions of the PBA "implied a fiduciary obligation on the part of Usarco", and that "a trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation". These comments do not apply to this case. The Monitor here, unlike the trustee in bankruptcy in Usarco, did not step into the shoes of the debtor. Thus, Usarco does not assist the Superintendent.

[59] For these reasons, I reject the Superintendent's argument that the motions judge was required in law to order the segregation of the amount of the deemed trusts during the CCAA proceeding. I now turn to the Superintendent's other submission: that the motions judge was required in law to order that the amount of the deemed trust be paid at the end of the CCAA proceedings, but before bankruptcy.

[60] The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds. See for example Re United Maritime Fishermen Co-op, [1988] N.B.J. No. 308, 68 C.B.R. (N.S.) 170 (Q.B.), at p. 173 C.B.R. (N.S.).

[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 [page124] insolvency regime and to the principle that the province cannot re-order 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 30-day stay of any

current or prospective proceedings under the BIA, and s. 11(4) authorizes an extension of the initial 30-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. [page125]

[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, 51 C.C.P.B. 297 (S.C.J.), 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. Last

year it passed the Wage Earner Protection Program Act, S.C. 2005, c. 47. That Act would amend the BIA and give special priority to unpaid pension contributions of a bankrupt employer. This statute, however, has not been proclaimed in force. That it was passed perhaps shows that under the existing legislative regime, claims like that of the Superintendent must fail. I would reject this ground of appeal.

(d) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed?

[70] In my view, the motions judge's order lifting the stay was a discretionary order. He summarized his reasons for [page126] rejecting the Superintendent's position and exercising his discretion to allow the bankruptcy petitions to proceed at para. 18 of his decision:

> 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.

[71] Appellate review of a discretionary order under the CCAA is limited. See Re Air Canada (2003), 66 O.R. (3d) 257, [2003] O.J. No. 2976 (C.A.), at para. 25; Re Royal Crest Lifecare Group Inc., [2004] O.J. No. 174, 46 C.B.R. (4th) 126 (C.A.), at para. 23; Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (C.A.), at para. 16. Appellate intervention is justified only for an error in principle or the unreasonable exercise of discretion. The Superintendent submits that the motions judge exercised his discretion improperly

-- on a wrong principle -- because he ignored the "unfair and prejudicial" effects of his order on the Companies' most vulnerable class of creditors: the pension beneficiaries. I disagree.

[72] The Superintendent argues that the motions judge's order was unfair to the pension beneficiaries in three related ways. First, she points out that the pension beneficiaries agreed to a stay of the past service contributions to keep the Companies afloat, which in turn permitted the going concern sale to Heico. That sale greatly enhanced the return to the creditors. The Superintendent contends that now permitting the bankruptcy petitions to proceed, which would potentially deprive the pension beneficiaries of their rights, produces an unfair outcome.

[73] Undoubtedly, and regrettably, the pension beneficiaries stand to suffer from the insolvency of the Companies. However, the Superintendent's argument implicitly assumes that the pension beneficiaries alone made sacrifices to maximize the recovery for all creditors. The motions judge rejected this assumption, which he said at para. 2 of his reasons, "somewhat overstates the situation". The motions judge accurately concluded [at para. 4]:

> [O]ther 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. [page127]

In short, all creditors gave up something to permit the Companies to stay in business so that they could either reorganize or sell their assets in a going concern sale.

[74] Second, the Superintendent contends that the motions judge's order undermined his earlier pension stay order, which had expressly preserved the pension beneficiaries' deemed trust rights. I do not accept this contention. Although the pension stay order did not take away these deemed trust rights, it did

not provide that the deemed trusts would be paid out of any sale proceeds. Instead, para. 4 of the pension stay order provided that the Companies would not incur any obligation because of their failure to pay past service contributions during the stay period. Moreover, even though the Superintendent and the QPC knew that a petition for bankruptcy (by the Bank of Nova Scotia) was pending when they agreed to the pension stay order, they did not ask that the order be conditional on payment of the amount of the deemed trusts when the stay was lifted.

[75] The third aspect of unfairness on which the Superintendent relies is that the motions judge's order fails to take account of the law's "special solicitude" for pensioners. Certainly provincial pension legislation has shown this solicitude. It has recognized the importance of ensuring that retirees have income security. Thus, it has legislated statutory trusts and liens to protect their pension claims. But federal insolvency law has not shown the same solicitude. It does not accord the claims of "sympathetic" creditors more weight than the claims of "unsympathetic" ones. Subject to specified exceptions, the BIA aims to distribute a bankrupt debtor's estate equitably among all of the estate's creditors. There are undoubtedly compelling policy reasons to protect pension rights in an insolvency. But, as I have said, it is for Parliament, not the courts, to do so.

[76] Therefore, I do not accept the Superintendent's unfairness argument. Also, in my view, numerous considerations supported the motions judge's decision to lift the stay and permit the bankruptcy petitions to proceed. These considerations include the following:

-- 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. [page128]

-- The petitioning creditors have met the technical

requirements for bankruptcy. And their desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order. See for example Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 57 D.L.R. (4th) 623, 73 C.B.R. (N.S.) 273 (B.C.C.A), at pp. 627, 630-31 D.L.R.; Re Harrop of Milton Inc. (1979), 22 O.R. (2d) 239, [1979] O.J. No. 4015 (S.C.), at pp. 244-45 O.R.

-- The Superintendent and the QPC agreed to the CCAA process. They recognized that it benefitted the pension claimants. Thus, they did not oppose either the pension stay order or the sale to Heico. They did not ask to have the deemed trusts satisfied or an amount to satisfy them set aside, though they knew that bankruptcy was pending. They likely recognized that if they had insisted on a segregation order, the other creditors may not have agreed to the sale. It is now too late for the Superintendent and the QPC to ask for relief that they never sought during the entire CCAA process.

-- The motions judge would have gone beyond his role as a referee in the CCAA proceedings if he had given effect to the Superintendent's claim. The Superintendent wants to jump ahead of all the other creditors by obtaining an extraordinary payment at the end of a long CCAA process. If the motions judge had ordered this payment, he would have upset the ground rules that all stakeholders agreed to and that he supervised for over two years.

[77] 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.

(e) Did the motions judge err by ordering the transfer of Ivaco and Ifastgroupe's head offices from Qubec to

Toronto?

[78] Ivaco's head office was in Montral; Ifastgroupe's head office was in Marieville, Qubec. The motions judge ordered that these head offices be transferred to Toronto. He did so in the light [page129] of s. 43(5) of the BIA, which states that an application for a bankruptcy petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor. The Superintendent, supported by the QPC, submits that the motions judge had no jurisdiction to make this order, or that he improperly exercised his discretion in doing so. I disagree with both submissions.

[79] The Superintendent and the QPC contend that the CCAA does not expressly authorize a judge to transfer the location of the head office of a debtor company. And, although a judge in CCAA proceedings has inherent jurisdiction to control the court's processes, the judge does not have a similar jurisdiction to do what the motions judge did here: control the debtor Companies' or the creditors' processes. See Re Stelco Inc. (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (C.A), at para. 38.

[80] I accept the Superintendent's and the QPC's contention that the CCAA did not give the motions judge jurisdiction to order the transfer. I also accept that the transfer was not made to facilitate a restructuring under the CCAA. Instead it was made to facilitate future bankruptcy proceedings. Nonetheless, in my view, the motions judge did not need to resort to the CCAA because he had express authority to order the transfer in s. 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA"). Section 191(1) and (2) provide:

191(1) In this section, "reorganization" means

a court order made under;

(a) section 241;

(b) the Bankruptcy and Insolvency Act approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might be lawfully be made by an amendment under section 173.

[81] The applicable section here is s. 191(1)(c). The stay order is an order under an Act of Parliament, the CCAA, that affects the rights among the Companies, its shareholders and its creditors. See Re Beatrice Foods Inc., [1996] O.J. No. 5495, 43 C.B.R. (4th) 10 (C.J.). Therefore, as both Ivaco and Ifastgroupe were subject to an order under s. 191(1)(c) of the CBCA, under s. 191(2) each of its articles may be amended to effect any change that might be made by an amendment under s. 173. Section 173(1)(b) of the statute permits a corporation to change the location of its head office: [page130]

173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

. . . . .

(b) change the province in which its registered office is situated;

[82] On my reading of the statute, s. 191 is a stand-alone section that gave the motions judge authority to order the transfer. Provided a corporation is subject to an order under s. 191(1), its articles may be amended. The amending order under s. 191(2) need not serve the purpose of the triggering statute in s. 191(1), in this case the CCAA. If Parliament had wanted to limit amendments to those that would facilitate a reorganization, it could have said so. Thus, the combination of ss. 191(1)(c), 191(2) and 173(1)(b) gave the motions judge the jurisdiction to order the transfer of Ivaco and Ifastgroupe's head offices from Qubec to Toronto. Resort to the CCAA was unnecessary.

[83] The Superintendent and the QPC rely on this court's

decision in Re Stelco in support of their argument. However, that case differs from the present case in a material way. In Re Stelco, the issue was whether a motions judge in CCAA proceedings could order the removal of two members of the company's board of directors under s. 109(1) of the CBCA. The power to remove directors is vested in the shareholders. Blair J.A. held that the motions judge could not rely on the court's discretion under s. 11 of the CCAA to override or supplant the specific power in s. 109(1) of the CBCA. The discretion under s. 11 must be used to control the court's processes, not the company's processes.

[84] By contrast, in the present case, s. 191 of the CBCA gives the court express authority to order the transfer of the head office of a company that is subject to an order under the CCAA. Thus, to make a transfer order, the court need not rely on its discretion under s. 11 of the CCAA.

[85] However, the jurisdiction in s. 191(2) is discretionary, as evidenced by the use of the word "may". Therefore, the remaining question on this ground of appeal is whether the motions judge properly exercised his discretion in ordering the transfer. I think that he did.

[86] Ivaco and Ifastgroupe had not actively carried on business since the sale of their assets to Heico was completed in December 2004. The Monitor holds the proceeds of the sales in bank accounts in Toronto. Because of the lengthy and complex CCAA proceedings, the Ontario Superior Court -- Commercial List is familiar with the affairs of Ivaco and Ifastgroupe. Having all the issues common to all the Companies administered at the same [page131] time before the court familiar with these issues will facilitate the most efficient, consistent and just administration and distribution of their estates.

[87] The QPC, in particular, objects to these head office transfers. It argues that the motions judge's order will enable the creditors to defeat a future motion to transfer to the Qubec Superior Court the question whether the Companies participating in the Ivaco Salaried Plan are "solidarily liable", that is jointly and severely liable, under Qubec law

for satisfying the obligation to fund the plan.

[88] The underpinning of the QPC's argument is as follows: the "solidarily liable" provision is unique to Qubec law and therefore should be decided by a Qubec court. Whether the Qubec or the Ontario Superior Court presides over this future motion will turn on the application of the forum conveniens principle. One relevant factor in assessing the forum conveniens is the residence or place of business of the parties. According to the QPC, transferring Ivaco's and Ifastgroupe's head offices to Toronto will tip the scales in favour of the Ontario Superior Court hearing the "solidarily liable" motion.

[89] It seems to me that this is a weak argument. The QPC has not yet brought this motion. When it does, the Ontario Superior Court can assess the relevant considerations affecting the appropriate forum. Now, however, the motions judge's transfer order just makes good sense. He, therefore, exercised his discretion properly. I would not give effect to this ground of appeal.

D. Conclusion

[90] The motions judge did not err in law in refusing to order the immediate payment of the amount of the deemed trusts under the Pension Benefits Act or in refusing to segregate that amount. Nor did he err in exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed. Finally, the motions judge did not err in ordering that the head offices of Ivaco and Ifastgroupe be transferred from Qubec to Toronto. Accordingly, I would dismiss the Superintendent's appeal.

[91] If the parties cannot agree on the costs of the appeal, they may make written submissions to the court. These submissions should be delivered within 30 days of the release of these reasons.

Appeal dismissed. [page132]

Notes

Note 1: Taking into accout a $12 million distribution to the National Bank permitted by the motions judge in December 2004.

TAB 9

COURT FILE NO.: CV-08-7722-00CL
DATE: 20090126

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **THE BANK OF NOVA SCOTIA (Applicant) v. HURONIA PRECISION PLASTICS INC. (Respondent)**

BEFORE: **MORAWETZ J.**

COUNSEL: **Sam Rappos, for the Applicant, The Bank of Nova Scotia**

A'Amer Ather, for the Canada Revenue Agency

Chris Burr for Maxium Financial Services Inc.

HEARD: **NOVEMBER 4, 2008**

E N D O R S E M E N T

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

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

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

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

> 9. THIS COURT ORDERS that notwithstanding paragraph 30 of the Appointment Order, the Receiver shall withhold from the net proceeds of the Purchased Assets the total sum of $130,000 (the "Holdback") pending resolution of the claim asserted by Canada Revenue Agency ("CRA") respecting possible pre-receivership GST arrears said to be owing by the Debtor (the "GST Claim"). The Receiver shall distribute the Holdback, or any balance thereof after payment to CRA of the amount of the GST Claim to the extent that it is found to attach to the net proceeds in priority to the interest of Maxium and BNS, 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 *Re Ivaco Inc*. [2006] O.J. No. 4152 (C.A.) stands for the proposition that it is not improper to seek a bankruptcy order for the purpose of reversing a statutory priority. In this case, it would be to reverse the priority position of CRA. Further, the timing of BNS's action has no bearing on the validity of the action being sought as there are no such time limitations imposed under s.222(1.1).

[14] It seems to me that the issue to consider is whether paragraph 9 of the Vesting Order operates so as to support the position put forth by CRA. In my view, the paragraph is clear where it provides that the Receiver "shall distribute the Holdback, or any balance thereof, after payment to the CRA of the amount of the GST Claim to the extent that it is found to attach to the net proceeds in priority to the interest of … [Maxium and BNS]". [emphasis added]

[15] I agree with the submission of counsel to BNS that paragraph 9 reflects that any distribution of the Holdback to CRA is dependent on a determination as to whether the GST Claim attaches to the Holdback in priority to the interest of BNS.

[16] In its factum, counsel to CRA, at paragraph 24 states that the Receiver's obligation to pay the deemed trust portion of the GST was made explicit and that the obligation to pay CRA was not otherwise qualified by any conditions. I disagree. The emphasized portion of paragraph 9 has to be given a common sense interpretation which, in this case, takes into account that, at the time of the issuance of the Vesting Order, there was an outstanding issue with respect to the priority of the interest of Maxium and BNS.

[17] CRA also made the submission that the Receiver had certain obligations and responsibilities as set out in paragraph 9 of the Vesting Order which specifically qualifies the Receiver's rights as set out in the Appointment Order. Counsel for CRA submitted that the relevant portion of the Vesting Order specifically speaks to payment to CRA and, as of the date of the hearing of this motion, with Huronia not being bankrupt, the Receiver is under an obligation to pay CRA the amount of its deemed trust claim. I do not read paragraph 9 in such a way that it supports this submission. At the time of the granting of the Vesting Order, the issue of priority with respect to the interest of Maxium and BNS had not been determined with finality. It follows that the payment obligation to CRA had not been triggered.

[18] Paragraph 9 does not, in my view, direct the Receiver to distribute the Holdback to CRA forthwith upon the CRA providing evidence to the Receiver with respect to the amounts owing by Huronia for the period prior to the issuance of the Appointment Order. If it did, the emphasized words in paragraph 9 would serve no purpose.

[19] Finally, with respect to the request of BNS to lift the stay for the purpose of bringing an application for a bankruptcy order against Huronia and authorizing the Receiver to consent to such application, I am satisfied that the desire for BNS to use the *BIA* to alter priorities is a legitimate reason to seek a bankruptcy (see *Re Ivaco Inc*.) and the timing of the BNS's action has no bearing on the validity of this request.

[20] Consequently, it follows that the motion of BNS is granted and an order shall issue lifting the stay of proceedings against Huronia for the purpose of permitting BNS to bring the application for bankruptcy order and authorizing the Receiver to consent to such application on behalf of Huronia.

[21] In these circumstances, it also follows that no order is to be made directing the Receiver to make payment to CRA, nor is the stay to be lifted to enable CRA to take steps to protect its position. The motion of CRA is dismissed.

[22] If the parties are unable to agree on costs, brief written submissions, to a maximum of three pages, may be filed within 20 days.

MORAWETZ J.

DATE: January 26, 2009

TAB 10

CITATION: American General Life Insurance Company et al. v. Victoria Avenue North Holdings Inc. et al., 2023 ONSC 3322
COURT FILE NO.: CV-21-00665375-00CL
DATE: 20230530

SUPERIOR COURT OF JUSTICE – ONTARIO - COMMERCIAL LIST

APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985,c. B-3, as amended, and under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43

RE: AMERICAN GENERAL LIFE INSURANCE COMPANY and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., Applicants

AND:

VICTORIA AVENUE NORTH HOLDINGS INC. and THE PARTIES LISTED ON SCHEDULE "A", Respondents

BEFORE: P.J. Osborne J.

COUNSEL: *Aryo Shalviri and Alexia Parente*, Counsel for the Receiver

Evan Cobb, Independent counsel to the Receiver – Distribution Motion

George Bourikas, Receiver

Katherine Forbes, Receiver

Elie Ghannoum, Counsel for Bou-Zaid General Contracting Inc.

HEARD: May 30, 2023

ENDORSEMENT

1. KPMG Inc., in its capacity as Receiver, seeks approval of an asset purchase agreement (the Sale Agreement of April 28, 2023) and authority to complete the Proposed Transaction, approval of activities, a discharge to be effective upon the filing of a Receiver's Certificate, and ancillary relief including authorization to pay real estate commissions and make further Distributions. Finally, the Receiver seeks to seal certain confidential documents and to unseal other confidential documents previously sealed by this Court.

2. Defined terms in this Endorsement have the meaning given to them in the motion materials and in particular the Sixth Report of the Receiver, filed. The Receiver relies on all Reports, and the Sixth Report in particular.

3. None of the relief sought today is opposed by any party. It is strongly recommended by the Court-appointed Receiver, and supported by Bou-Zaid General Contracting Inc.

4. I have not set out all of the background to this matter. The Property over which the Receiver was appointed consisted primarily of interests in two medical office buildings in Hamilton, Ontario located at 304 Victoria Ave., North ("304") and 414 Victoria Avenue North ("414") respectively.

5. This Court granted a Sale Process Order on October 29, 2021. The Sale Process was carried out by the Receiver in accordance with orders of the Court and is more fully described in the Third, Fourth and Sixth Reports.

6. A May 24 Transaction previously approved by this Court failed to close when the purchaser declined to waive due diligence conditions. An October 14 Transaction was approved by the Court on October 14, 2022 in respect of 304. The order made that day sealed the 304 Confidential Appendices, and the October 14 Transaction closed on December 6, 2022.

7. On April 28, 2023, the Receiver entered into the Sale Agreement with the Purchaser in respect of 414.

8. That Sale Agreement is the subject of the approval motion today. I am satisfied that the *Soundair* Principles have been satisfied. While not determinative, the fact that there is no opposition in this matter is supportive of that conclusion.

9. The Receiver has made best efforts to get the best price. Further marketing efforts would not yield a better price or better terms. The Sale Process (previously approved) and now adhered to, protects the interests of the parties, the efficacy and integrity of the process, and there is no unfairness.

10. The draft approval and vesting order is consistent with the model of the Commercial List.

11. The sale was facilitated by the efforts of the Broker. Its Engagement Agreement, entered into by the Receiver pursuant to its authority under the Appointment Order, provides for a commission. That Engagement Agreement was previously approved by the court as part of the Sale Process Order. The sale is approved.

12. Payment of the Commission is appropriate, in accordance with the Engagement Agreement, recommended by the Receiver and is unopposed. The Receiver confirms its opinion that the Commission is consistent with the market and was earned here in accordance with the Engagement Agreement. The Commission is approved.

13. In respect of the distribution motion, the Receiver was represented by separate counsel as noted above. The particulars of the proposed distribution are set out in the Sixth Report. The Receiver seeks to distribute to the Applicants, in partial satisfaction of their secured claims, the anticipated net proceeds of the sale of 414, excluding a holdback for completion

of the Receiver's mandate, ongoing operating expenses, and the anticipated bankruptcy of the Legal Owner.

14. Counsel to the Receiver on that motion has opined with respect to the validity and enforceability of the security granted by the Legal Owner in favour of the Applicants that subject to customary qualifications, the charge and security interest is valid.

15. I observe that the Net Sale Proceeds are not sufficient to satisfy the secured obligations owing to the applicable Applicants.

16. It is appropriate to authorize a receiver to make distributions of sale proceeds concurrently with the approval of such sale to maximize efficiency and avoid the need for additional motions: *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc*., 2014 ONSC 1173 at para. 53.

17. I observe that, as submitted, the Legal Owner appears to have outstanding HST arrears related to the period prior to the commencement of these proceedings. While, in the ordinary course outside of at bankruptcy, unremitted HST may result in a deemed trust claim by the Crown pursuant to section 222(1) of the *Excise Tax Act*, I note that such deemed trust would not survive in a bankruptcy, which is proposed and intended here in any event. The Court of Appeal for Ontario has held that a bankruptcy order may be sought with the express purpose of affecting priorities: *Grant Forest Products Inc. v. The Toronto Dominion Bank*, 2015 ONCA 570 at para. 118.

18. Moreover and in any event, even prior to the effect of the proposed bankruptcy on a deemed trust claim for HST arrears, section 222(4) of the *Excise Tax Act* provides an exception to the deemed trust provisions that the Receiver submits, and I accept, applies in this case. It provides that, for the purposes of the deemed trust provisions, a security interest does not include certain "prescribed security interests".

19. A "prescribed security interest" is defined in section 2(1) of the *Security Interest (GST/HST) Regulations* as:

> For the purpose of subsection 222(4) of the Act, a prescribed security interest, in relation to an amount deemed under subsection 222(1) of the Act to be held in trust by a person, is that part of the mortgage or hypothec securing the performance of an obligation of the person that encumbers Landor a building, but only if the mortgage or hypothec is registered pursuant to the appropriate land registration system before the time the amount is deemed under subsection 222(1) of the Back to be held in trust by the person.

20. It follows that the deemed trust pursuant to section 222(1) that could otherwise be applicable outside of a bankruptcy in this case may not apply to the proceeds of sale of the Transaction Properties to the extent that: (i) such proceeds are allocated to the lands and buildings secured by the Applicants' mortgages, which all proceeds of sale are in this case; and (ii) the Applicants' mortgages were registered prior to the non-remittance of HST (and indeed prior to the date upon which such remittance was required to be made) that would give rise to a deemed trust.

21. I also observe in this case that the federal Crown was specifically served with the motion record returnable today and has not appeared to oppose. Moreover, counsel for the Canada

Revenue Agency (Attorney General) had informal discussions with counsel for the Receiver with respect to this issue, so there is no issue that the federal Crown was not aware of the relief being sought.

22. It follows that there need be no further action taken in respect of any deemed trust in respect of HST arrears.

23. The activities of the Receiver are set out in detail in its Reports. The principles set out by this Court with respect to approval of activities of a Monitor and its reports are applicable to the approval of the activities of a Receiver and its activities also: see *Target Canada* and *Laurentian University*, for example.

24. I am satisfied that the activities of the Receiver as set out in the Sixth Report were necessary, consistent with its duties and powers granted in the Appointment Order and were reasonable and for the benefit of stakeholders generally. The activities are approved.

25. Given that other than the Remaining Activities, the Receiver has completed the administration of these Proceedings, discharge is appropriate, to be effective upon the filing of a Receiver's Discharge Certificate. The Receiver is discharged upon that filing.

26. The Receiver also seeks a limited release in favour of it and its counsel. I note that such a release is contemplated by the Model Discharge Order and can be granted absent improper or negligent conduct, none of which is alleged here. See also: *Pinnacle v. Kraus*.

27. The Receiver seeks a limited release temporally circumscribed up to the date of the Discharge, Distribution and Ancillary Matters Order, and the limited subsequent release up to the date of the filing of the Discharge Certificate, provided that parties of interest are given notice of same and have an opportunity to object to such subsequent release.

28. I am satisfied that this sequential mechanism is appropriate here. It provides that the parties of interest have full and transparent disclosure of the nature and scope of the release sought, and an opportunity to challenge it or raise any issues, should they choose to do so.

29. Having reviewed all of the materials and having heard the submissions of counsel, there being no opposition, I am satisfied that the Receiver and its counsel are entitled to both releases to be effective pursuant to the mechanism described above.

30. The Receiver also seeks relief in respect of the sealing and unsealing of certain documents. In particular, it seeks to seal the 414 Confidential Appendices. They contain confidential and commercially sensitive information with respect to the key economic terms of the Proposed Transaction. Public disclosure of those terms now could negatively impact the integrity of that Proposed Transaction. The sealing order is effective only until the closing of the Proposed Transaction or upon further order of the Court. The *Sierra Club* and *Sherman Estate* test is met, and the sealing of the 414 Confidential Appendices is approved.

31. Counsel for the Receiver is to file the 414 Confidential Appendices (and, if not already done, the 304 Confidential Appendices) with the Commercial List Office in a sealed envelope marked: "Confidential and not to form part of the public record on the terms ordered by this Court and subject to further Court order".

32. The 414 Confidential Appendices and the 304 Confidential Appendices shall be unsealed upon the closing of the Proposed Transaction.

33. Orders to go in the form signed by me today which are effective immediately and without the necessity of issuing and entering.

Osborne J.

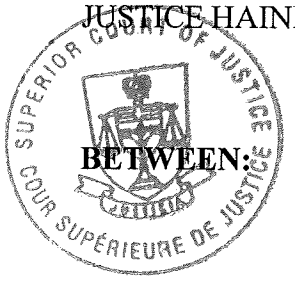
Date: May 30, 2023

TAB 11

Court File No. CV-17-588420-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	FRIDAY, THE 18th
	)	
JUSTICE HAINEY	)	DAY OF MAY, 2018



BETWEEN:

FARM CREDIT CANADA

Applicant

and

NORTH AMERICA MILLING COMPANY LIMITED AND WOODBINE HOLDINGS ONTARIO INC.

Respondents

APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED, AND SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3 AS AMENDED

ANCILLARY ADMINISTRATION ORDER

THIS MOTION made by PricewaterhouseCoopers Inc. ("**PwC**"), in its capacity as court-appointed receiver (in such capacity, the "**Receiver**") without security, of all of the assets, undertakings and properties of North America Milling Company Limited ("**NAM**") and Woodbine Holdings Ontario Inc. ("**Woodbine**" and collectively, the "**Debtors**"), appointed pursuant to the Order of the Ontario Superior Court of Justice (Commercial List) dated December 21, 2017 (the "**Receivership Order**") for an Order that, *inter alia*:

(a) authorizes the Receiver to assign the Debtors into bankruptcy prior to the proposed sale of certain of the Debtors' assets to Triune Development Ltd. with

PwC as trustee (the "**Trustee**"), and authorizes the Receiver to make distributions to Farm Credit Canada ("**FCC**);

(b) approves the interim accounts of the Receiver and its legal counsel from the date of the issuance of the Receivership Order to April 20, 2018;

(c) approves the report of the Receiver dated December 29, 2017 (the "**First Report**"), the supplemental report to the First Report dated January 29, 2018 (the "**Supplemental Report**"), the report of the Receiver dated May 4, 2018 (the "**Second Report**") and the activities described therein; and

(d) terminates these receivership proceedings and discharges the Receiver subject to the completion of certain remaining duties, as evidenced by the filing of a Receiver's certificate (the "**Receiver's Discharge Certificate**"),

was heard on this date at 330 University Avenue, Toronto, Ontario.

ON READING the material filed, including the Notice of Motion, the Second Report and the appendices thereto, including the Affidavit of Michael McTaggart sworn April 26, 2018 (the "**McTaggart Affidavit**") and the Affidavit of Christopher G. Armstrong sworn April 26, 2018 (the "**Armstrong Affidavit**"), and on hearing the submissions of counsel for the Receiver and the Applicant, and those other parties present, no one else appearing although duly served as evidenced by the affidavit of Andrew Harmes sworn May 8, 2018, filed,

Service

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

Defined Terms

2. **THIS COURT ORDERS** that capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Second Report.

Approval of Activities, Fees and Disbursements

3. **THIS COURT ORDERS** that the First Report, the Supplementary Report and the Second Report and the activities of the Receiver described therein are hereby approved.

4. **THIS COURT ORDERS** that (a) the fees and disbursements of the Receiver as set out in the McTaggart Affidavit and as described in the Second Report, and (b) the fees and disbursements of Goodmans LLP, counsel to the Receiver, as set out in the Armstrong Affidavit and as described in the Second Report, respectively, incurred in connection with this proceeding, are hereby authorized and approved.

5. **THIS COURT ORDERS** that the fees and disbursements of the Receiver and Goodmans LLP, respectively, that are not set out in the McTaggart Affidavit or the Armstrong Affidavit but have been or will be incurred in the performance of the duties of the Receiver are hereby authorized and approved up to a maximum amount of $150,000 in the aggregate.

Bankruptcy of the Debtors and Distribution

6. **THIS COURT ORDERS** that the Receiver is authorized to file an assignment in bankruptcy in respect of each of the Debtors pursuant to Section 49 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended, appointing PwC as Trustee of each of the Debtors.

7. **THIS COURT ORDERS** that the Receiver is hereby authorized and directed, from time to time and without further order of this Court, to make distributions to FCC up to a maximum amount of the FCC Indebtedness (plus any further accrued interest and expenses) and the monies borrowed by the Interim Receiver which are secured by the Receiver's Borrowing Charge (as defined in the Receivership Order), collectively, subject to the maintenance of a holdback of funds in the Receiver's account in an amount satisfactory to the Receiver for the estimated amount of professional fees of PwC (as Receiver or Trustee) and PwC's legal counsel to complete final administration of the receivership proceedings and administration of the Debtors' estates.

Termination of the Receivership Proceedings

8. **THIS COURT ORDERS** that the within receivership proceedings shall be terminated without any further act or formality, at 12:01 a.m. (Eastern time) on the business day following the date on which the Receiver files the Receiver's Discharge Certificate substantially in the form attached here to as Schedule "A" with this Court, certifying that, to the best of the knowledge and belief of the Receiver, all matters to be attended to in connection with the receivership proceedings have been completed (the "**Receivership Termination Time**").

9. **THIS COURT ORDERS** that the Receiver's Charge and the Receiver's Borrowing Charge (each as defined in the Receivership Order) shall be and are hereby terminated, released and discharged effective at the Receivership Termination Time.

Discharge of the Receiver

10. **THIS COURT ORDERS** that the Receiver shall, at least seven (7) days prior to the Receivership Termination Time, provide notice to the E-Service List of the Receiver's intention to file the Receiver's Discharge Certificate.

11. **THIS COURT ORDERS** that effective at the Receivership Termination Time, PwC shall be and is hereby discharged as Receiver and shall have no further duties, obligations or responsibilities as Receiver from and after the Receivership Termination Time, provided however that notwithstanding its discharge herein, the Receiver shall continue to have the benefit of the provisions of all Orders made in these proceedings, including all approvals, protections and stays of proceedings in favour of PwC in its capacity as Receiver.

12. **THIS COURT ORDERS** that effective at the Receivership Termination Time, the Receiver and all of its directors, officers, partners, employees, agents and lawyers (collectively, the "**Releasees**") are hereby released from any and all claims in respect of all acts or omissions of the Releasees, or any of them, in the performance or intended performance of the Receiver's mandate in these proceedings or any activity related thereto, save and except for any gross negligence or wilful misconduct on the part of a Releasee, with respect to that Releasee only.

General

13. 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 Receiver and its 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 Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

14. THIS COURT ORDERS that the Receiver be at liberty and is 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.

Hainey J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:
MAY 18 2018
PER / PAR:

SCHEDULE "A"
FORM OF RECEIVER'S DISCHARGE CERTIFICATE

Court File No. CV-17-588420-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

FARM CREDIT CANADA

Applicant

and

NORTH AMERICA MILLING COMPANY LIMITED AND WOODBINE HOLDINGS ONTARIO INC.

Respondents

APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED, AND SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3 AS AMENDED

RECEIVER'S DISCHARGE CERTIFICATE

RECITALS

A. Pursuant to an Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated December 21, 2017, PricewaterhouseCoopers Inc. was appointed as the receiver (the "**Receiver**") of the assets, properties and undertakings of North America Milling Company Limited and Woodbine Holdings Ontario Inc. (collectively, the "**Debtors**").

B. The receivership proceedings have been completed in accordance with the Orders of this Court.

C. Pursuant to an Order of the Court dated May 18, 2018 (the "**Ancillary Administration Order**"), the Receiver shall be discharged and the receivership proceedings shall be terminated upon the filing of this Receiver's Discharge Certificate with the Court.

D. Unless otherwise indicated herein, capitalized terms have the meanings as set out in the Ancillary Administration Order.

THE RECEIVER HEREBY CERTIFIES the following:

1. To the best of the Receiver's knowledge and belief, all matters to be attended to in connection with these receivership proceedings have been completed; and

2. The Receiver has, at least seven (7) days prior to the date hereof, provided notice to the Service List of the Receiver's intention to file this Receiver's Discharge Certificate.

ACCORDINGLY, the Receivership Termination Time has occurred.

This Certificate was delivered by the Receiver at **[time]** on **[date]**.

PRICEWATERHOUSECOOPERS INC., in its capacity as court-appointed receiver of North America Milling Company Limited and Woodbine Holdings Ontario Inc., and not in its personal capacity

Per: _____

Name:

Title:

Court File No. CV-17-588420-00CL

APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED, AND SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3 AS AMENDED

FARM CREDIT CANADA Applicant	- and -	NORTH AMERICA MILLING COMPANY LIMITED et al. Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ANCILLARY ADMINISTRATION ORDER

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Lawyers for the Receiver

TAB 12

Court File No. CV-19-614593-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	TUESDAY, THE 25th
	)	
JUSTICE MCEWEN	)	DAY OF JUNE, 2019

B E T W E E N:

CORNER FLAG LLC

Applicant

– and –

ERWIN HYMER GROUP NORTH AMERICA, INC.

Respondent

APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43

ORDER
(Bankruptcy Application and Interim Distribution)

THIS MOTION made by Alvarez & Marsal Canada Inc., in its capacity as the court-appointed receiver and manager (the "**Receiver**") without security of all of the assets, undertakings and properties of Erwin Hymer Group North America, Inc. ("**EHGNA**" or the "**Debtor**"), for an Order authorizing the Receiver to file an assignment into bankruptcy on behalf of the Debtor, authorizing the Receiver to make certain distributions to Corner Flag LLC ("**Corner Flag**") and certain payments to Mercedes-Benz Financial Services USA LLC ("**MBFS US**"), and

granting related relief was heard this day at the Court House, 330 University Avenue, Toronto, Ontario.

ON READING the First Report of the Receiver dated March 20, 2019 and the Second Report of the Receiver dated June 10, 2019 (the "**Second Report**") and on hearing the submissions of counsel for the Receiver, Corner Flag and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Waleed Malik affirmed June 11, 2019 and the Affidavit of Service of Ana Chalupa sworn June 11, 2019, both filed:

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the timing and method of service of the Notice of Motion and Motion Record be and are hereby abridged and validated, and this motion is properly returnable today.

2. **THIS COURT ORDERS** that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Second Report.

BANKRUPTCY APPLICATION

3. **THIS COURT ORDERS** that the Receiver be and is hereby authorized, but not obligated, to file an assignment into bankruptcy under the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") on behalf of the Debtor at any time following the delivery of the Receiver's Certificate (as defined in the Order (Roadtrek Approval and Vesting) dated June 17, 2019 (the "**AVO**")) and that Alvarez & Marsal Canada Inc. is authorized, but not obligated, to act as trustee in bankruptcy of the Debtor in respect of any such bankruptcy proceedings.

DISTRIBUTIONS

4. **THIS COURT ORDERS** that the Receiver be and is hereby authorized and directed to distribute to Corner Flag, in one or more distributions, from the net proceeds realized from the Transactions (as defined in Second Report) (collectively, the "**Net Proceeds**") (excluding the Construction Lien Reserve (as defined in the AVO)), the full amount of the indebtedness owing by the Receiver to Corner Flag under the Receiver Term Sheet as soon as reasonably practical following receipt of such Net Proceeds.

5. **THIS COURT ORDERS** that, after payment of the amount set out in paragraph 4, the Receiver be and is hereby authorized to distribute to Corner Flag, in its discretion without further order of the Court, the balance of the Net Proceeds and any other amounts being held by the Receiver from time to time, towards the reduction of the indebtedness owing by the Debtor to Corner Flag under the Corner Flag Promissory Note and Corner Flag Security (together with the Corner Flag Promissory Note, the "**Corner Flag Loan Documents**") up to a maximum amount of the indebtedness owing by the Debtor to Corner Flag under the Corner Flag Loan Documents, provided, however, that no amounts shall be distributed to Corner Flag from the Construction Lien Reserve until each of the Construction Liens (as defined in the AVO) is settled and discharged in accordance with the terms of the Ancillary Administration Order of this Court dated June 17, 2019.

PAYMENTS TO MBFS US

6. **THIS COURT ORDERS** that the Receiver be and is hereby authorized to, following payment in full of amounts owing to Corner Flag, in the Receiver's sole discretion and without further order of this Court, make one or more payments to MBFS US in respect of amounts owing by EHG Chassis (as guaranteed by EHGNA) for MBFS US Financed Collateral sold to

third parties where proceeds were received by EHGNA pre-receivership, as such payments are described at Sections 15 and 16.1 of the Second Report.

7. **THIS COURT ORDERS** that notwithstanding:

(a) the pendency of these proceedings;

(b) any assignment in bankruptcy or any petition for a bankruptcy order now or hereafter issued pursuant to the BIA and any order issued pursuant to any such petition; or

(c) any assignment in bankruptcy made in respect of the Debtor;

the payments and distributions contemplated in this Order, are made free and clear of any Claims and Encumbrances (each as defined in the AVO), are binding on any trustee in bankruptcy that may be appointed in respect of the Debtor, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any applicable federal or provincial legislation, as against Corner Flag or MBFS US, and shall not constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

GENERAL

8. **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 Receiver and its 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 Receiver, as an officer of this Court, as

may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

9. **THIS COURT ORDERS** that any of the Construction Lien Claimants, Corner Flag, MBFS US and the Receiver may seek directions from this Court in respect of any matter contemplated herein.

SUPERIOR COURT OF JUSTICE
ENTERED

JUN 26 2019
RW

COUR SUPÉRIEURE DE JUSTICE
ENTRÉ

CORNER FLAG LLC
Applicant

and

ERWIN HYMER GROUP NORTH AMERICA, INC.
Respondent

Court File No. CV-19-614593-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER
(Bankruptcy Application and Interim Distribution)

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Counsel for the Receiver

TAB 13

Court File No. CV-18-00604099-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	THURSDAY, THE 23RD DAY
	)	
JUSTICE HAINEY	)	OF APRIL, 2020

BETWEEN:

IN THE MATTER OF THE RECEIVERSHIP OF VIRK HOSPITALITY CORP.

AND IN THE MATTER OF A MOTION PURSUANT TO SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

ORDER
(Authorization to Bankrupt Virk Hospitality Corp.)

THIS MOTION, brought by Grant Thornton Limited ("**GTL**"), in its capacity as Court-appointed receiver ("**Receiver**") of Virk Hospitality Corp. ("**Virk**"), for an order empowering and authorizing the Receiver to execute and file an assignment in bankruptcy on behalf of Virk, and for certain relief ancillary thereto, was heard this via telephone conference.

ON READING the Eight Report of the Receiver dated February 26, 2020 (the "**Report**"), and on hearing the submissions of counsel for the Receiver, no one appearing for any other person on the service list,:

1. **THIS COURT ORDERS** that the Report and the conduct and activities of the Receiver described therein be and hereby is approved.

2. **THIS COURT ORDERS** that the Receiver is empowered and authorized to execute and file an assignment in bankruptcy on behalf of Virk.

3. **THIS COURT ORDERS** that the Receiver is authorized and empowered to nominate GTL to act as trustee in bankruptcy of Virk.

4. **THIS COURT ORDERS** that on consent of the Receiver and the Mizzi Respondents that nothing in this Order shall constitute an admission by any of the Mizzi Respondents of any of the facts set out in the Report and shall not preclude the Mizzi Respondents from pursuing defences in any other litigation that require the Mizzi Respondents to dispute the facts set out in the Report.

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

APR 23 2020

PER / PAR:

Doc#4726207v2

IN THE MATTER OF THE RECEIVERSHIP OF VIRK HOSPITALITY CORP.

Court File No. CV-18-00604099-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at TORONTO

ORDER

CHAITONS LLP
Barristers and Solicitors
5000 Yonge Street, 10th Floor
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Maya Poliak (LSO # 54100A)
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Lawyers for the Court-appointed Receiver, Grant Thornton Limited

TAB 14

Court File No. CV-18-59964400CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	THURSDAY, THE 14th
	)	
JUSTICE HAINEY	)	DAY OF MAY, 2020

B E T W E E N:

FIREPOWER DEBT GP INC., AS AGENT

Applicant

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O 1990, C. C-43, AS AMENDED

ORDER

THIS MOTION, brought by the Applicant, for, *inter alia*, an order authorizing and directing MNP Ltd., in its capacity as Court-appointed receiver (the "**Receiver**") of the property, assets and undertaking of TheRedPin.Com Realty Inc., to file an assignment in bankruptcy in the name of and on behalf of TheRedPin.Com Realty Inc., was heard this day via videoconference due to the COVID-19 crisis.

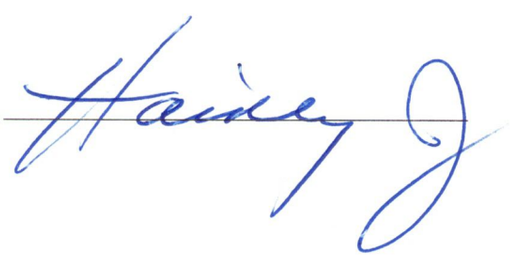
ON READING the Applicant's Notice of Motion, the Third Report of the Receiver dated May 6, 2020 and the appendices thereto, and on hearing submissions from counsel for the Applicant, the Receiver, and such other counsel in attendance on the videoconference,

1. **THIS COURT ORDERS** that the time for service of the Applicant's Notice of Motion is hereby abridged and validated, and the manner of service of the Notice of Motion is hereby validated, so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that the Receiver is hereby empowered, authorized and directed to file an assignment in bankruptcy in the name of and on behalf of TheRedPin.Com Realty Inc. The Receiver is hereby authorized and directed to take such steps and execute such documents as may be necessary or desirable to complete the filing of the assignment in bankruptcy.

3. **THIS COURT ORDERS** that the Receiver is authorized and empowered to nominate MNP Ltd. to act as trustee in bankruptcy of TheRedPin.Com Realty Inc.

4. **THIS COURT ORDERS** that, notwithstanding Rule 59.05, this order is effective from the date it is made, and it is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal order need be entered and filed unless an appeal or motion for leave to appeal is brought to an appellate court. Any party may nonetheless submit a formal order for original, signing, entry and filing, as the case may be, when the Court returns to regular operations.



TAB 15

Court File No. CV-21-00674530-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	FRIDAY, THE 27th DAY OF
	)	
JUSTICE CAVANAGH	)	MAY, 2022

B E T W E E N:

PIVOT FINANCIAL I LIMITED PARTNERSHIP

Applicant

- and -

3174026 CANADA INC.

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED

ORDER

THIS MOTION made by PricewaterhouseCoopers Inc., LIT, in its capacity as receiver and manager (in such capacity, the "**Receiver**") of the property, assets and undertakings of 3174026 Canada Inc. (formerly known as HockeyShot Inc.) (the "**Debtor**") was heard this day via videoconference.

ON READING the Third Report of the Receiver dated May 24, 2022 (the "**Third Report**") and the appendices thereto and on hearing the submissions of counsel for the Receiver and those parties listed on the counsel slip, no one else appearing for any other person although duly served as appears from the affidavit of service of Danny Nunes sworn May 24, 2022, filed:

SERVICE

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

APPROVAL OF SECURED CREDITOR DISTRIBUTIONS

2. **THIS COURT ORDERS** that any capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Third Report.

3. **THIS COURT ORDERS** that the Receiver is authorized to make the distribution payment to Pivot on account of the Debtor's secured indebtedness to Pivot, as set out in the Third Report.

4. **THIS COURT ORDERS** that the Receiver is authorized to make the distribution payments, as set out in the Third Report, to: (i) BDC on account of the Debtor's secured indebtedness to BDC; and (ii) to BDC Capital in respect of the undisputed principal and accrued interest owed to BDC Capital on account of the Debtor's secured indebtedness to BDC Capital.

5. **THIS COURT ORDERS** that the Receiver is authorized to make payment of the BDC Capital Disputed Amount either upon resolution of the Disputed Amount to the Receiver's satisfaction or pursuant to further Order of this Court, subject to available cash on hand to fund payment of the Disputed Amount.

ASSIGNMENT IN BANKRUPTCY

6. **THIS COURT ORDERS** that the Receiver is authorized to assign or cause the Debtor to make an assignment into bankruptcy and that the Receiver shall be entitled but not obligated to act as trustee in bankruptcy of the Debtor.

APPROVAL OF ACTIVITIES AND FEES

7. **THIS COURT ORDERS** that the Second Report of the Receiver dated March 13, 2022 and the activities of the Receiver described therein are approved, provided, however, that only the Receiver in its personal capacity and only with respect to its own personal liability shall be entitled to rely upon or utilize in any way such approval.

8. **THIS COURT ORDERS** that the Third Report and the activities of the Receiver described therein are approved, provided, however, that only the Receiver in its personal capacity and only with respect to its own personal liability shall be entitled to rely upon or utilize in any way such approval.

9. **THIS COURT ORDERS** that the fees and disbursements of the Receiver and the Receiver's counsel, DLA Piper (Canada) LLP, as set out in the Third Report, are hereby approved.

APPROVAL OF RECEIVER'S STATEMENT OF R&D

10. **THIS COURT ORDERS** that the Receiver's statement of receipts and disbursements for the period of January 6, 2022 to May 16, 2022 is hereby approved.

GENERAL

11. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada to give effect to this Order and to assist the Receiver and its 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 Receiver as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

_____

Court File No.: CV-21-00674530-00CL

PIVOT FINANCIAL I LIMITED PARTNERSHIP	and	**3174026 CANADA INC.**
Applicant		**Respondent**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDINGS COMMENCED AT TORONTO

ANCILLARY RELIEF ORDER

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Lawyers for the Receiver

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL CORPORATION	and	**STATEVIEW HOMES (MINU TOWNS) INC., STATEVIEW HOMES (NAO TOWNS) INC., STATEVIEW HOMES (ON THE MARK) INC., TLSFD TAURASI HOLDINGS CORP. AND STATEVIEW HOMES (HIGH CROWN ESTATES) INC.**
Applicants		Respondents

Court File No.: CV-23-00698576-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

BOOK OF AUTHORITIES OF KINGSETT MORTGAGE CORPORATION

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Lawyers for KingSett Mortgage Corporation