Court File No. CV-19-00615270-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

DISTINCT INFRASTRUCTURE GROUP INC., DISTINCT INFRASTRUCTURE GROUP WEST INC., DISTINCTTECH INC., IVAC SERVICES INC., IVAC SERVICES WEST INC., and CROWN UTILITIES LTD.

Respondents

BOOK OF AUTHORITIES OF THE MOVING PARTIES MEGA DIESEL HOLDINGS LTD. AND CHRIS ARON WOOD

(Returnable December 17, 2019)

December 6, 2019

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INDEX

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IN THE MATTER OF Section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended

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I N D E X

TAB

TAB 1

2017 ONCA 301
Ontario Court of Appeal

Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.

2017 CarswellOnt 5333, 2017 ONCA 301, 138 O.R. (3d) 373,
2017 C.L.L.C. 220-038, 277 A.C.W.S. (3d) 842, 47 C.B.R. (6th) 1

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, and section 68 of the Construction Lien Act, R.S.O. 1990, C.30, as amended

Romspen Investment Corporation (Applicant) and Courtice Auto Wreckers Limited, Northwood Recycling & Energy Inc., 800619 Ontario Limited, Power Grow Systems Inc., Courtice Energy Corp., Les Rebuts De Pates et Papiers De L'Outaouais Ltee., Les Amenagements Guirard Inc., Courtice Industries Inc., 2254066 Ontario Inc., and Lakes Terminals & Warehousing Ltd. (Respondents)

Doherty, J.C. MacPherson, P. Lauwers JJ.A.

Heard: December 6, 2016
Judgment: April 13, 2017
Docket: CA C62103

Proceedings: reversing *Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.* (2016), 36 C.B.R. (6th) 141, 2016 CarswellOnt 5634, 2016 ONSC 1808 (Ont. S.C.J.)

Counsel: Mark Zigler, James Harnum, for Appellant, International Union of Operating Engineers, Local 793
Lisa S. Corne, David P. Preger, for Respondent, Rosen Goldberg Inc., in its capacity as court-appointed Receiver

Subject: Civil Practice and Procedure; Insolvency; Public; Labour

Headnote

Labour and employment law --- Labour law — Bargaining rights — Certification — Objections to application — Grounds — Miscellaneous

Union represented mechanics employed by debtor — Receivership order stayed proceedings against debtor and receiver appointed under Bankruptcy and Insolvency Act — Receiver terminated six employees at company related to debtor company, OD, and replaced them with workers from another related company — Union's unfair labour practice (ULP) complaint and certification application on behalf of bargaining unit comprised of six OD employees was dismissed by labour board — Union's motion seeking leave to proceed with certification and ULP before board was dismissed — Union appealed — Appeal allowed — Stay of proceedings was lifted and certification application and ULP complaint was to proceed — Appeal's central issue was relationship of federal bankruptcy law and provincial labour laws and intersection was receiver's legitimate attempt to sell failing company and labour rights of some of company's employees, including their right to seek to join union and their right not to be fired unfairly — Motion judge erred by not granting union leave to continue as successful certification application did not provide guarantee, but allowed employees to combine bargaining power and rely on union's assistance in negotiating terms and conditions of employment — Interfering with employees' ability to exercise statutory labour rights caused clear prejudice — There was sound reason to lift stay and allow certification application to proceed since union and employees had lot at stake but harm caused to other creditors would not be any more than de minimis prejudice — Motion judge did not err by not granting union leave to continue its ULP complaint as matter of law since he was not holding ULP complaints could not exist independently of certification application but was of opinion on facts that ULP complaint could not stand independently of certification application.

Labour and employment law --- Labour law — Unfair labour practices — Practice and procedure — Miscellaneous
Union represented mechanics employed by debtor — Receivership order stayed proceedings against debtor and receiver appointed under Bankruptcy and Insolvency Act — Receiver terminated six employees at company related to debtor company, OD, and replaced them with workers from another related company — Union's unfair labour practice (ULP) complaint and certification application on behalf of bargaining unit comprised of six OD employees was dismissed by labour board — Union's motion seeking leave to proceed with certification and ULP before board was dismissed — Union appealed — Appeal allowed — Stay of proceedings was lifted and certification application and ULP complaint was to proceed — Appeal's central issue was relationship of federal bankruptcy law and provincial labour laws and intersection was receiver's legitimate attempt to sell failing company and labour rights of some of company's employees, including their right to seek to join union and their right not to be fired unfairly — Motion judge erred by not granting union leave to continue as successful certification application did not provide guarantee, but allowed employees to combine bargaining power and rely on union's assistance in negotiating terms and conditions of employment — Interfering with employees' ability to exercise statutory labour rights caused clear prejudice — There was sound reason to lift stay and allow certification application to proceed since union and employees had lot at stake but harm caused to other creditors would not be any more than de minimis prejudice — Motion judge did not err by not granting union leave to continue its ULP complaint as matter of law since he was not holding ULP complaints could not exist independently of certification application but was of opinion on facts that ULP complaint could not stand independently of certification application.
Bankruptcy and insolvency --- Bankruptcy and receiving orders — Rescission or stay of order
Union represented mechanics employed by debtor — Receivership order stayed proceedings against debtor and receiver appointed under Bankruptcy and Insolvency Act — Receiver terminated six employees at company related to debtor company, OD, and replaced them with workers from another related company — Union's unfair labour practice (ULP) complaint and certification application on behalf of bargaining unit comprised of six OD employees was dismissed by labour board — Union's motion seeking leave to proceed with certification and ULP before board was dismissed — Union appealed — Appeal allowed — Stay of proceedings was lifted and certification application and ULP complaint was to proceed — Appeal's central issue was relationship of federal bankruptcy law and provincial labour laws and intersection was receiver's legitimate attempt to sell failing company and labour rights of some of company's employees, including their right to seek to join union and their right not to be fired unfairly — Motion judge erred by not granting union leave to continue as successful certification application did not provide guarantee, but allowed employees to combine bargaining power and rely on union's assistance in negotiating terms and conditions of employment — Interfering with employees' ability to exercise statutory labour rights caused clear prejudice — There was sound reason to lift stay and allow certification application to proceed since union and employees had lot at stake but harm caused to other creditors would not be any more than de minimis prejudice — Motion judge did not err by not granting union leave to continue its ULP complaint as matter of law since he was not holding ULP complaints could not exist independently of certification application but was of opinion on facts that ULP complaint could not stand independently of certification application.
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Union represented mechanics employed by debtor — Receivership order stayed proceedings against debtor and receiver appointed under Bankruptcy and Insolvency Act — Receiver terminated six employees at company related to debtor company, OD, and replaced them with workers from another related company — Union's unfair labour practice (ULP) complaint and certification application on behalf of bargaining unit comprised of six OD employees was dismissed by labour board — Union's motion seeking leave to proceed with certification and ULP before board was dismissed — Union appealed — Appeal allowed — Stay of proceedings was lifted and certification application and ULP complaint was to proceed — Appeal's central issue was relationship of federal bankruptcy law and provincial labour laws and intersection was receiver's legitimate attempt to sell failing company and labour rights of some of company's employees, including their right to seek to join union and their right not to be fired unfairly — Motion judge erred by not granting union leave to continue as successful certification application did not provide guarantee, but allowed employees to combine bargaining power and rely on union's assistance in negotiating terms and conditions of employment — Interfering with employees' ability to exercise statutory labour rights caused clear prejudice — There was sound reason to lift stay and allow certification application to proceed since union and employees had lot at stake but harm caused to other creditors would not be any more than de minimis prejudice — Motion judge did not err by

not granting union leave to continue its ULP complaint as matter of law since he was not holding ULP complaints could not exist independently of certification application but was of opinion on facts that ULP complaint could not stand independently of certification application.

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave

Union represented mechanics employed by debtor — Receivership order stayed proceedings against debtor and receiver appointed under Bankruptcy and Insolvency Act — Receiver terminated six employees at company related to debtor company, OD, and replaced them with workers from another related company — Union's unfair labour practice (ULP) complaint and certification application on behalf of bargaining unit comprised of six OD employees was dismissed by labour board — Union's motion seeking leave to proceed with certification and ULP before board was dismissed — Union appealed — Appeal allowed — Stay of proceedings was lifted and certification application and ULP complaint was to proceed — Appeal's central issue was relationship of federal bankruptcy law and provincial labour laws and intersection was receiver's legitimate attempt to sell failing company and labour rights of some of company's employees, including their right to seek to join union and their right not to be fired unfairly — Motion judge erred by not granting union leave to continue as successful certification application did not provide guarantee, but allowed employees to combine bargaining power and rely on union's assistance in negotiating terms and conditions of employment — Interfering with employees' ability to exercise statutory labour rights caused clear prejudice — There was sound reason to lift stay and allow certification application to proceed since union and employees had lot at stake but harm caused to other creditors would not be any more than de minimis prejudice — Motion judge did not err by not granting union leave to continue its ULP complaint as matter of law since he was not holding ULP complaints could not exist independently of certification application but was of opinion on facts that ULP complaint could not stand independently of certification application.

On October 19, 2015, pursuant to a secured creditor's application, a receiver was appointed for several corporations. On December 9, 2015, the International Union of Operating Engineers, Local 794 (Union) applied to the Ontario Labour Relations Board (Board) for certification, seeking to represent a bargaining unit comprised of six employees. The union asserted that two days later, the receiver dismissed four of the six employees in the proposed bargaining unit and hired new workers to perform duties similar to those performed by the dismissed employees. The receiver offered business reasons for the dismissals and denied hiring replacement workers. On December 14, 2015, the board stayed the union's certification application, holding that the stay imposed by the receivership order applied. In response, the union filed an unfair labour practice (ULP) complaint with the board alleging that the receiver dismissed the employees at least in part as a result of anti-union animus. Based on the board's decision to stay its application, the union sought leave of the court to proceed with its certification application and ULP complaint at the board. The motion judge dismissed the union's motion. The union appealed.

Held: The appeal was allowed.

Per MacPherson J.A. (Doherty J.A. concurring): Staying the union's certification application proceeding duly interfered with the employees' ability to exercise their statutory rights. Labour rights did not end when insolvency proceedings began. Allowing the union's certification application to proceed did not automatically increase the rights employees as creditors, thereby prejudicing other creditors and it was not foregone conclusion that the application for certification would be successful.

Per Lauwers J.A. (dissenting): The motion judge was owed deference. Being experienced in insolvency, he was fully alive to relevant law and to the business realities facing all the parties. He was also familiar with particular facts and this was why it was important for the appellate court, from the standard of review standpoint, to defer to the bankruptcy judge and his discretion under s. 215 of Bankruptcy and Insolvency Act or to the terms of the receivership order.

Giving the union carte blanche to begin certification for insolvent enterprises after the date of the appointment of a receiver or the date of an order under the Companies' Creditors Arrangement Act would effect a sea change in insolvency law. It would profoundly alter the economic dynamics of insolvency, and whether the Companies' Creditors Arrangement Act route was preferable to outright bankruptcy. The stay of proceedings was the insolvency regime's tool to establish order.

Table of Authorities

Cases considered by *J.C. MacPherson J.A.*:

Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — followed

Enroute Imports Inc., Re (2016), 2016 ONCA 247, 2016 CarswellOnt 5045, 35 C.B.R. (6th) 1 (Ont. C.A.) — followed

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 2006 SCC 35, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 351 N.R. 326, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193, 215 O.A.C. 313, [2006] 2 S.C.R. 123 (S.C.C.) — followed

Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community (2012), 2012 ONSC 7319, 2012 CarswellOnt 16827, 97 C.B.R. (5th) 303, 19 C.L.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — considered

Cases considered by *P. Lauwers J.A.* (dissenting):

AbitibiBowater inc., Re (2010), 2010 QCCS 1065, 2010 CarswellQue 2332 (C.S. Que.) — refered to in a minority or dissenting opinion

Alberta (Attorney General) v. Moloney (2015), 2015 SCC 51, 2015 CSC 51, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 476 N.R. 318, 85 M.V.R. (6th) 37, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, [2015] 3 S.C.R. 327, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 606 A.R. 123, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 652 W.A.C. 123 (S.C.C.) — considered in a minority or dissenting opinion

Canwest Global Communications Corp., Re (2011), 2011 ONSC 2215, 2011 CarswellOnt 2392, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]) — refered to in a minority or dissenting opinion

Crystalline Investments Ltd. v. Domgroup Ltd. (2004), 2004 SCC 3, 2004 CarswellOnt 219, 2004 CarswellOnt 220, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), 2004 CSC 3, 70 O.R. (3d) 254 (S.C.C.) — considered in a minority or dissenting opinion

Eagle River International Ltd., Re (2001), 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, (sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.)* 207 D.L.R. (4th) 385, (sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.)* 280 N.R. 155, (sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.)* [2001] 3 S.C.R. 978, 2001 CSC 92 (S.C.C.) — considered in a minority or dissenting opinion

Essar Steel Algoma Inc., Re (2016), 2016 ONSC 1802, 2016 CarswellOnt 4103, 35 C.B.R. (6th) 89 (Ont. S.C.J. [Commercial List]) — considered in a minority or dissenting opinion

Essar Steel Algoma Inc., Re (2016), 2016 ONCA 274, 2016 CarswellOnt 5758, 36 C.B.R. (6th) 56 (Ont. C.A.) — refered to in a minority or dissenting opinion

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 2006 SCC 35, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 351 N.R. 326, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193, 215 O.A.C. 313, [2006] 2 S.C.R. 123 (S.C.C.) — considered in a minority or dissenting opinion

Gordon v. Canada (Attorney General) (2016), 2016 ONCA 625, 2016 CarswellOnt 13037, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 351 O.A.C. 44, 2016 C.L.L.C. 220-058, 404 D.L.R. (4th) 590, (sub nom. *Professional Institute of the Public Service of Canada v. Canada (Attorney General))* 364 C.R.R. (2d) 164 (Ont. C.A.) — refered to in a minority or dissenting opinion

Gordon v. Canada (Attorney General) (2017), 2017 CarswellOnt 2265, 2017 CarswellOnt 2266 (S.C.C.) — refered to in a minority or dissenting opinion

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 570, 2015 CarswellOnt 11970, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2nd) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 2015 C.E.B. & P.G.R. 8139 (headnote only), 337 O.A.C. 237, 26 C.C.E.L. (4th) 176, 4 P.P.S.A.C. (4th) 358 (Ont. C.A.) — refered to in a minority or dissenting opinion

Hawkair Aviation Services Ltd., Re (2006), 2006 BCSC 669, 2006 CarswellBC 1007, 22 C.B.R. (5th) 11, 18 B.L.R. (4th) 294 (B.C. S.C. [In Chambers]) — refered to in a minority or dissenting opinion

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — considered in a minority or dissenting opinion

Ma, Re (2001), 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68, 143 O.A.C. 52 (Ont. C.A.) — considered in a minority or dissenting opinion

Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General) (2015), 2015 SCC 1, 2015 CSC 1, 2015 CarswellOnt 210, 2015 CarswellOnt 211, 380 D.L.R. (4th) 1, 249 L.A.C. (4th) 1, 2015 C.L.L.C. 220-010, 466 N.R. 199, 328 O.A.C. 1, (sub nom. *Mounted Police Association of Ontario v. Canada (Attorney General)*) [2015] 1 S.C.R. 3, 325 C.R.R. (2d) 300, 129 O.R. (3d) 559 (note) (S.C.C.) — refered to in a minority or dissenting opinion

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 3583, 75 C.C.P.B. 233, 55 C.B.R. (5th) 68 (Ont. S.C.J. [Commercial List]) — refered to in a minority or dissenting opinion

Nortel Networks Corp., Re (2009), 2009 ONCA 833, 2009 CarswellOnt 7383, 77 C.C.P.B. 161, 59 C.B.R. (5th) 23, (sub nom. *Sproule v. Nortel Networks Corp.)* 2010 C.L.L.C. 210-005, 256 O.A.C. 131, (sub nom. *Sproule v. Nortel Networks Corp.)* 99 O.R. (3d) 708 (Ont. C.A.) — considered in a minority or dissenting opinion

Nortel Networks Corp., Re (2010), 2010 CarswellOnt 1760, 2010 CarswellOnt 1761, 406 N.R. 390 (note), 270 O.A.C. 400 (note) (S.C.C.) — refered to in a minority or dissenting opinion

PIPSC v. Canada (Attorney General) (2017), 2017 CarswellOnt 2263, 2017 CarswellOnt 2264 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Fitzgibbon (1990), [1990] 1 S.C.R. 1005, 107 N.R. 281, 40 O.A.C. 81, 78 C.B.R. (N.S.) 193, 55 C.C.C. (3d) 449, 76 C.R. (3d) 378, 1990 CarswellOnt 172, 1990 CarswellOnt 996 (S.C.C.) — refered to in a minority or dissenting opinion

Royal Canadian Mounted Police v. Canada (Attorney General) (2015), 2015 SCC 2, 2015 CSC 2, 2015 CarswellNat 16, 2015 CarswellNat 17, 380 D.L.R. (4th) 92, 249 L.A.C. (4th) 98, (sub nom. *Meredith v. Canada (Attorney General)*) 2015 C.L.L.C. 220-011, (sub nom. *Meredith v. Canada (Attorney General)*) 466 N.R. 338, (sub nom. *Meredith v. Canada (Attorney General)*) [2015] 1 S.C.R. 125, (sub nom. *Meredith v. Canada (Attorney General)*) 325 C.R.R. (2d) 278 (S.C.C.) — refered to in a minority or dissenting opinion

Royal Crest Lifecare Group Inc., Re (2004), 2004 CarswellOnt 190, 46 C.B.R. (4th) 126, (sub nom. *Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-06 & 2225-12 v. Ernst & Young Inc. (as trustee for Royal Crest Lifecare Group Inc.)*) 2004 C.L.L.C. 220-014, 181 O.A.C. 115, (sub nom. *C.U.P.E., Locals 1712, 3009, 2225-05, 2225-06, 22512 v. Royal Crest Lifecare Group Inc. (Trustee of)*) 98 C.L.R.B.R. (2d) 210 (Ont. C.A.) — refered to in a minority or dissenting opinion

Royal Crest Lifecare Group Inc., Re (2004), 2004 CarswellOnt 2984, 2004 CarswellOnt 2985, (sub nom. *C.U.P.E., Locals 1712 v. Royalcrest Lifecare Group)* 332 N.R. 399 (note) (S.C.C.) — refered to in a minority or dissenting opinion

SFL v. Saskatchewan (2015), 2015 SCC 4, 2015 CSC 4, 2015 CarswellSask 32, 2015 CarswellSask 33, [2015] 3 W.W.R. 1, D.T.E. 2015T-88, 248 L.A.C. (4th) 271, 380 D.L.R. (4th) 577, 2015 C.L.L.C. 220-014, 467 N.R. 3, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 451 Sask. R. 1, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 628 W.A.C. 1, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* [2015] 1 S.C.R. 245, (sub nom. *Saskatchewan Federation of Labour v. Saskatchewan)* 328 C.R.R. (2d) 1, 281 C.L.R.B.R. (2d) 1 (S.C.C.) — refered to in a minority or dissenting opinion

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered in a minority or dissenting opinion

Vachon v. Canada (Employment & Immigration Commission) (1985), [1985] 2 S.C.R. 417, (sub nom. *Vachon v. Canada Employment)* 63 N.R. 81, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, 1985 CarswellNat 12, 1985 CarswellNat 668 (S.C.C.) — refered to in a minority or dissenting opinion

White Birch Paper Holding Co., Re (2010), 2010 QCCS 2590, 2010 CarswellQue 6229, D.T.E. 2010T-443, 82 C.C.P.B. 192, 65 C.B.R. (5th) 186, [2010] R.J.Q. 1518, [2010] R.J.D.T. 887, 2010 CarswellQue 14255 (C.S. Que.) — refered to in a minority or dissenting opinion

407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy) (2015), 2015 SCC 52, 2015 CSC 52, 2015 CarswellOnt 17183, 2015 CarswellOnt 17184, 85 M.V.R. (6th) 1, 30 C.B.R. (6th) 207, 391 D.L.R. (4th) 248, (sub nom. *Moore*

(Bankrupt), Re) 340 O.A.C. 1, (sub nom. *Moore (Bankrupt), Re)* 477 N.R. 1, [2015] 3 S.C.R. 397 (S.C.C.) — considered in a minority or dissenting opinion

Statutes considered by *J.C. MacPherson J.A.*:

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

Generally — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 72(1) — considered

s. 193(a) — considered

s. 193(a)-193(c) — referred to

s. 193(c) — considered

s. 193(e) — considered

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

Generally — referred to

Statutes considered by *P. Lauwers J.A.* (dissenting):

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

Generally — referred to

s. 37 — referred to

s. 43 — considered

s. 49 — considered

s. 50 — considered

s. 57 — considered

ss. 69-69.3 — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — referred to

s. 72 — considered

s. 72(1) — considered

s. 141 — considered

s. 215 — referred to

s. 243 — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 2(d) — considered

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

Generally — referred to

s. 11 et seq. — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 33 — considered

s. 33(1) — considered

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

Generally — referred to

s. 101 — referred to

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

Generally — referred to

s. 43 — referred to

APPEAL by union from judgment reported at *Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.* (2016), 2016 ONSC 1808, 2016 CarswellOnt 5634, 36 C.B.R. (6th) 141 (Ont. S.C.J.), dismissing its motion seeking leave to proceed with matters relating to certification and unfair labour practices before Ontario Labour Relations Board.

***J.C. MacPherson J.A.*:**

A. INTRODUCTION

1 The appellant International Union of Operating Engineers, Local 793 (the "union") appeals from the decision of Wilton-Siegel J. (the "motion judge") of the Superior Court of Justice (Commercial List). The motion judge dismissed the union's motion seeking leave to proceed with matters relating to certification and unfair labour practices before the Ontario Labour Relations Board (the "OLRB"). The issue on the appeal is whether the motion judge erred in so doing.

B. FACTS

(1) The parties and events

2 On the application of Romspen Investment Corporation as secured creditor, and pursuant to an order of Penny J. of the Superior Court of Justice on October 19, 2015, Rosen Goldberg Inc. (the "Receiver") was appointed Receiver of several corporations (together, the "Ambrose Group"). One of those corporations is Courtice Auto Wreckers Limited (the "employer"). Paragraphs 7 and 8 of the receivership order provide that no proceeding can be commenced or continued in any court or tribunal against the Receiver or the debtors except with the consent of the Receiver or with leave of the court.

3 On December 9, 2015, the union applied to the OLRB for certification, seeking to represent a bargaining unit comprised of six employees at the employer's Harmony Road location in Oshawa (also known as Ontario Disposal).

4 The union asserts that two days later, on December 11, the Receiver dismissed four of the six employees in the proposed bargaining unit and, on December 14, hired new workers to perform duties substantially similar to those performed by the dismissed employees. The Receiver offers business reasons for the dismissals and denies hiring replacement workers.

5 On December 14, the OLRB stayed the union's certification application, holding that the stay imposed by the receivership order applied.

6 On December 18, the union filed an unfair labour practice ("ULP") complaint with the OLRB, alleging that the Receiver dismissed the employees at least in part as a result of anti-union animus.

7 In light of the OLRB's decision on December 14, the union sought leave of the court to proceed with its certification application and ULP complaint at the OLRB.

(2) The motion judge's decision

8 The motion judge dismissed the union's motion in its entirety.

9 The motion judge framed the inquiry in this fashion:

> [23] The Union's motion raises two separate, but related, issues. The Union seeks an order lifting the stay of proceedings under paragraphs 8 and 9 of the Receivership Order to allow it to proceed with the Certification Application against the Debtor. In addition, as the ULP Complaint will also require an inquiry into the conduct of the Receiver, the Union seeks an order lifting the stay of proceedings under paragraph 7 of the Receivership Order, as well as an order granting leave to proceed against the Receiver under section 215 of the *BIA*, in respect of the ULP Complaint.

10 With respect to the first issue — the certification issue — the motion judge considered whether he should make an order validating the commencement of the certification application on a *nunc pro tunc* basis. He framed the issue in this fashion:

> [43] In considering the Union's request for an order lifting the stay of proceedings in respect of the Certification Application on a *nunc pro tunc* basis, the Court must first address whether such an order would have been granted if it had been sought prior to commencement of the Certification Application.

11 The motion judge concluded that the court would not have granted leave at the relevant time. He offered four reasons in support of this conclusion:

> • The effect of the certification application is to increase the rights of the members of the proposed bargaining unit relative to other creditors of the Ambrose Group. This would be contrary to the policy and purpose of the stay of proceedings, which effectively freezes the rights and remedies of all creditors of the debtor as of the date of the receivership order.
>
> • Recognition of the proposed bargaining unit could impact the sale of Ontario Disposal and the proceeds that can be realized therefrom. It is inequitable to require creditors to accept a potential diminution in the value of the assets in circumstances where employees assert rights not previously in existence while the rights and remedies of the remaining stakeholders are frozen.
>
> • The fact that there may be purchasers who are willing to take Ontario Disposal assets subject to the proposed bargaining unit does not support the case for lifting the stay. In such circumstances, the union will be able to pursue the certification application against the purchaser as soon as a sale is completed. Accordingly, the union is not prejudiced by the stay.
>
> • There is no certainty that the proposed bargaining unit would be meaningful after the completion of any sale of Ontario Disposal assets. There is no guarantee what form the sale of Ontario Disposal assets will take.

12 Turning to the question of whether leave should be granted to permit the union to proceed with its ULP complaint, the motion judge again provided a negative answer. The core of his reasoning on this issue was:

> [57] [U]nless the Certification Application was validly commenced, the Union cannot assert that the employees were terminated in response to such action. Therefore, unless the Certification Application was validly commenced, there can be no ULP Complaint. Given the determinations above that the Certification Application is null and void, and that there is no basis for an order lifting the stay in respect of the Certification Application on a *nunc pro tunc* basis, it follows that there is no basis for the ULP Complaint.

13 The union appeals from the motions judge's order.

14 The Receiver moves to quash the appeal on the basis that the motion judge's order does not fall within the meaning of s. 193(a) through (c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). Accordingly, the appeal cannot proceed without leave of a judge of this court. The union did not seek the required leave when it filed its notice of appeal.

15 The union resists the Receiver's motion to quash. The union asserts that there is an automatic right of appeal under s. 193(a) and (c) for appeals involving "future rights" and property in excess of $10,000 and that its appeal implicates these categories.

16 In the alternative, if this court determines that s. 193(a) and (c) of the *BIA* do not support its direct appeal, the union makes a cross-motion seeking leave to appeal pursuant to s. 193(e) of the *BIA*.

C. ISSUES

Preliminary issues

(1) Is the appeal as of right pursuant to ss. 193(a) or 193(c) of the *BIA*?

(2) If the answer to (1) is 'No', should the union be granted leave to appeal pursuant to s. 193(e) of the *BIA*?

The appeal

(3) Did the motion judge err by not granting the union leave to continue its certification application at the OLRB?

(4) Did the motion judge err by not granting the union leave to continue its ULP complaint at the OLRB?

D. ANALYSIS

Preliminary issues [1]

(1) Motion to quash

17 The union says that its appeal is as of right under either s. 193(a) or (c) of the *BIA*:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> . . . . .
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;

(a) BIA s. 193(a)

18 The union asserts that in this case there are legal rights at issue that qualify as inchoate future rights. These future rights include the union's right to bargain collectively for its members (which only exists if the certification application is successful) and the employees' right to be represented by a union of their choice in their dealings with their employer.

19 I do not accept this submission. The leading case dealing with the interpretation of s. 193(a) of the *BIA* is *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.) ("*Pine Tree Resorts*"), where Blair J.A. defined "future rights", at para. 15:

> "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future. [Citations omitted.]

20 In this proceeding, the right at issue before the motion judge was the union's existing right to apply for certification at a time when a stay is in place. Accordingly, it cannot reasonably be said that the union's right to apply for certification depended on a future event that had not yet occurred.

(b) BIA s. 193(c)

21 The union contends that the rights at issue in its ULP complaint exceed $10,000. In addition to reinstatement of the four terminated employees, the union will seek back pay and damages that will exceed $10,000.

22 I am not persuaded by this submission. The right of appeal without leave under s. 193(c) must be narrowly construed and limited to cases where the appeal directly involves property exceeding $10,000 in value: *Enroute Imports Inc., Re*, 2016 ONCA 247, 35 C.B.R. (6th) 1 (Ont. C.A.), at para. 5. In my view, the union's proposed appeal involves a procedural matter — can the union proceed at this time with its certification application and ULP complaint at the OLRB? The appeal does not involve directly any quantum of money.

(c) Conclusion

23 The union cannot appeal as of right from the motion judge's decision. The Receiver's motion to quash the appeal is *prima facie* valid.

(2) Cross-motion for leave to appeal

24 In order to avoid its appeal being quashed, the union brings a cross-motion seeking leave to appeal pursuant to s. 193(e) of the *BIA*:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> . . . . .
>
> (e) in any other case by leave of a judge of the Court of Appeal.

25 The test for granting leave to appeal under this provision was set out by Blair J.A. in *Pine Tree Resorts*, at para. 29:

> 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.

26 The central issue in this appeal is the relationship between, and intersection of, federal bankruptcy law and general provincial labour relations law. The factual context for the intersection of these laws in this case is the Receiver's legitimate attempt to sell a large failing company and the important labour rights of some of the company's employees, including their right to seek to join a union and their right not to be fired unfairly. In my view, it is obvious that this issue is one of general importance to the practice in bankruptcy/insolvency matters and to the administration of justice generally.

27 The resolution of this appeal requires careful consideration of whether the motion judge's decision is consistent with the leading case in this domain involving the intersection of the *BIA* and provincial labour law, namely, the Supreme Court

of Canada's decision in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) ("*GMAC*"). I cannot say that the proposed appeal appears to be unmeritorious.

28 Finally, I am satisfied that this appeal will not unduly hinder the progress of these insolvency proceedings. The issues on appeal are narrow and the record is modest. Moreover, the Receiver did not move to quash the appeal until almost six months after the union filed its notice of appeal and three months after the hearing date was set. As a result, the Receiver's motion to quash and the union's cross-motion for leave were argued as part of the appeal proper. It cannot be said that granting leave in these circumstances would unduly hinder the progress of these proceedings.

29 For these reasons, I would grant the union leave to appeal from the motion judge's order.

The appeal

(3) The certification application

30 In determining whether to lift a stay of proceedings imposed by a receivership order, a court should consider the totality of the circumstances and the relative prejudice to both sides: *Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community*, 2012 ONSC 7319, 97 C.B.R. (5th) 303 (Ont. S.C.J. [Commercial List]), at para. 5. While not strictly applicable, a court may take guidance from the jurisprudence addressing the lifting of stays under s. 69.4 of the *BIA*: see *Peoples Trust Co.*, at para. 5 and Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2016-2017 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2016), at p. 1085. While the motion judge correctly identified these principles, in my view each of the four reasons he relied on to support his decision not to lift the stay presents problems. I will address those reasons in turn.

31 First, the motion judge reasoned that leave ought to be refused because the certification application would in effect increase the rights of the members of the proposed bargaining unit relative to other creditors of the Ambrose Group.

32 In my view, this reasoning rests on supposition. A successful certification application does not guarantee employees better wages; it simply allows employees to combine their bargaining power and rely on the union's assistance in negotiating their terms and conditions of employment. While it is true that upon certification certain rights and obligations crystallize that would not otherwise (e.g. the employer's duty to recognize the union and bargain with it in good faith), certification does not have the effect of automatically increasing the rights employees have *as creditors*, thereby prejudicing other creditors. It is simply conjecture at this point to assume that the union will be successful in negotiating a more financially favourable contract for bargaining unit employees. Moreover, at this juncture, allowing the union's certification application to proceed merely entitles the union to a representation vote, not to certification.

33 The motion judge next reasoned that recognition of the proposed bargaining unit could negatively impact a sale of Ontario Disposal and that, in the circumstances, it would be inequitable to require creditors to accept such an outcome.

34 In my view, this line of reasoning is speculative. While some purchasers may be dissuaded by recognition of the proposed bargaining unit, it may also be that a set collective agreement, with its clarity of terms, would be attractive to a prospective purchaser. The union, on behalf of its members, has an interest in the business being sold as a going concern and therefore has an incentive to act in a manner that would promote such an outcome.

35 More fundamentally, however, there is simply no concrete evidence that recognition of the proposed bargaining unit would negatively impact a sale. The Receiver's statement in its first report that it has 'serious concerns' that certification could negatively impact a sale amounts to little more than self-serving speculation. Without having concrete evidence before him to ground the Receiver's apparent concern, the motion judge erred in denying the union leave to proceed with its certification application on this basis. Further, even if there was some evidence to substantiate the Receiver's concern, the union has indicated its willingness to delay bargaining a collective agreement for up to a year should the Receiver produce such evidence.

36 The motion judge also reasoned that the union will be able to pursue its certification application against the purchaser as soon as a sale is completed and that, therefore, the union faces no prejudice as a result of the continuation of the stay.

37 I am not persuaded by this point. Interfering with employees' ability to exercise their statutory labour rights, particularly in circumstances where employees were allegedly terminated for exercising those rights, causes clear prejudice. The right to form and join a union of one's choosing is a fundamental right under the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A (the "*LRA*"). While flexibility is required to address the challenges in any particular insolvency proceeding, courts should not unduly inoculate insolvency proceedings against the legitimate exercise of labour rights simply because the assertion of those rights represents an inconvenience to the receivership process: *GMAC*, at paras. 50-51.

38 Further, maintaining the stay and delaying the representation vote risks undermining the legitimacy of the vote. As the Board itself noted in this case, "the scheme of the [*LRA*] is premised on quick votes". Quick votes at once minimize the possibility of undue influence and maximize the validity of the vote as a reflection of employee wishes. Delaying the vote prejudices these important objectives.

39 Moreover, at present, there is nothing on the record that suggests that a suspension of these employees' labour rights will be a short-lived, stop-gap measure. On the motion, the Receiver offered no specifics of a planned sale or prospective purchaser. As of the appeal hearing, the Receiver had been running the business for over a year with no definite end in sight. In my view, it is unreasonable to characterize as entirely non-prejudicial what amounts to an indefinite suspension of the union's and employees' ability to exercise labour rights they otherwise enjoy at law, especially where, as here, employees have allegedly faced retribution for so doing.

40 Finally, the motion judge reasoned that leave ought to be refused given that there is no certainty that the proposed bargaining unit would be meaningful after the completion of any sale of Ontario Disposal assets.

41 Again, this is speculative. Whatever the results of the sale, the employees' have presently existing rights, established under the *LRA*, to organize themselves and select a collective bargaining agent. The fact that a court may speculate as to the ultimate efficacy of their decision to organize in this manner does not diminish the prejudice suffered now by preventing employees from exercising those rights.

42 In light of the above, I am of the view that the motion judge erred in refusing to lift the stay. It therefore falls to this court to determine afresh whether the union ought to be granted leave to proceed with its certification application.

43 I turn, then, to consider the relative prejudice to both sides.

44 On the one hand, the Receiver can point to little material prejudice should the stay be lifted. For the reasons discussed above, I do not accept that a sale will be prevented or that sale proceeds will be diminished should the union be granted leave to proceed with its certification application. And while I am willing to accept that certification proceedings inevitably involve some legal costs, I do not accept that these costs would be significant in this case. The union's certification application is an especially simple one. There are six employees in the proposed bargaining unit. The union applied for a unit at a specific street address (rather than a municipal-wide unit) and it appears from the record that there is only one classification of employees on-site. As the union's in-house counsel, a labour lawyer who has been involved in many certification applications, swore in her affidavit in support of the union's motion, "this [certification application] is as straightforward as any I have seen." It is also important to recognize that the employer is only one of a number of corporations within the Ambrose Group and that the the Ontario Disposal location, for which the union seeks certification, represents only one of the employer's two operations (the other operation has been unionized for some time). In these circumstances, I am simply not persuaded that allowing the union's certification application to proceed would cause any more than *de minimis* prejudice to Ambrose Group creditors.

45 On the other hand, a lot is at stake for the union and the employees. Maintaining the stay prejudices the important objectives 'quick votes' are designed to serve, unduly interferes with employees' ability to exercise their statutory labour rights, and, particularly where employees have allegedly been dismissed for exercising those rights, undermines employee confidence in the efficacy of core labour rights and protections.

46 Labour rights do not end when insolvency proceedings begin. Indeed, s. 72(1) of the *BIA* provides:

> 72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.
>
> [Emphasis added.]

47 As the Supreme Court of Canada explained in *GMAC*, at para. 47: "[t]he effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*." There is no such conflict here.

48 In light of the above, on weighing the relative prejudice to both sides, I am satisfied that there are sound reasons in this case to lift the stay and allow the union to proceed with its certification application.

(4) The unfair labour practice complaint

49 The threshold for granting leave to proceed against a receiver is not a high one and is designed to protect a receiver against only frivolous or vexatious actions or actions that have no basis in fact: *GMAC*, at para. 55. Given the timing of the dismissals, the *prima facie* merit of the ULP complaint is, in my view, obvious.

50 The motion judge, however, reasoned that, given that the commencement of the certification application forms the core factual basis for the ULP complaint, "[i]n this particular case, there can be no ULP complaint independent of the prior commencement of the certification application."

51 The union argues that the motion judge erred in holding that the union was not entitled to bring a ULP complaint without a valid prior commencement of a certification application.

52 I do not accept this argument. On my reading of his reasons, the motion judge was not holding that, as a matter of law, ULP complaints cannot exist independently of certification applications. He was simply of the opinion that, in the particular circumstances of this case, given its factual basis, the ULP complaint could not stand independently of the certification application.

53 Even on this more narrow interpretation, however, the motion judge's reasoning is flawed. The fact that the certification application may be an irregularity (unless and until leave is granted *nunc pro tunc*) does not erase the fact that the application was filed. I see no sound basis upon which to preclude the union from relying on this fact to establish how and when the employer became aware of the union's organizing campaign. It would not only be unfair but also a triumph of form over substance to prevent individuals who have lost their jobs from asserting basic protections otherwise available to them under law because of a technical defect in a legally distinct proceeding. In any event, I would hold that the certification application ought to proceed and, as such, so too should the ULP complaint.

E. DISPOSITION

54 I would grant the appellant leave to appeal, allow the appeal, set aside the order of the motion judge, and grant the appellant leave to proceed with its certification application and unfair labour practice complaint before the Ontario Labour Relations Board.

55 The appellant is entitled to its costs of the appeal which I would fix at $12,000, inclusive of disbursements and HST.

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

I agree.

***P. Lauwers J.A.* (dissenting):**

56 Like my colleague, and for the reasons he gives, I would grant leave to appeal from the bankruptcy judge's order. The issues raised are undoubtedly important to the practice of insolvency law.

57 However, I would dismiss the appeal of the bankruptcy judge's refusal to lift the stay with respect to both the union certification process, and the unfair labour practice complaint.

58 The bankruptcy judge is owed deference regarding the exercise of his discretion, and I am not persuaded that he erred in law or in principle, as I will explain.

A. THE ORGANIZATION OF THESE REASONS

59 I begin with an overview of the insolvency system, make several preliminary observations, and then turn to describe the governing principles for this appeal. After setting out the bankruptcy judge's reasoning, I apply the governing principles to the facts as he found them, taking into account my colleague's reasoning.

B. AN OVERVIEW OF THE INSOLVENCY REGIME

60 The insolvency regime in Canada is intricate and the way it addresses the interests of debtors, creditors and others is carefully calibrated. The regime includes the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), and the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). See generally the decision of Deschamps J. in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at paras.12-24.

C. PRELIMINARY OBSERVATIONS

61 There is no doubt that "creditors include unionized employees", as Abella J. states in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.), at para. 2. Indeed, creditors include all of the debtor's employees, unionized or not.

62 The intersection of insolvency law and labour relations law has occupied much judicial time in recent years. Judges have struggled to find the right balance between the interests of employees on the one hand, including the importance of maintaining an effective mechanism for rescuing distressed companies if possible, and, on the other hand, for efficiently and fairly liquidating them in the interests of all the creditors including the employees, if it is not possible.

63 Some instructive contextual comments are made in the paper delivered in a 2017 National Judicial Institute program entitled "From Deterrence to Detente: Overview of the Intersection of Labour Law and the CCAA", authored by Massimo Starnino, Debra McKenna, Lauren Pearce and Glynnis Hawe, members of the Paliare Roland Rosenberg Rothstein LLP law firm. The authors begin the discussion with this observation, at p. 2:

> Experience tells us that in practice the singular focus of creditors is to use leverage in the CCAA process, and sometimes to manufacture leverage through the CCAA process, to extract the biggest piece of an economic pie that, no matter how expanded, is inevitably perceived to be inadequate.

64 The authors note that increasingly "the battle for value ... has often been between lenders ... on the one side, and organized labour on the other" (at p. 2). The complaint is made, at p. 3, that the court is inclined to accept "arguments that the rights and obligations created by provincial labour legislation are in conflict with the restructuring objective of the CCAA and therefore subordinate to the broad discretionary authority afforded to the court." As union counsel did in this case, they urge bankruptcy and CCAA judges to take into account how their jurisdiction might be affected by s. 2(d) of the *Canadian Charter of Rights and Freedoms*.

65 The effort in this case to certify the union after the receiver's appointment represents a new front in the "battle" the authors describe between employees and the other creditors of an insolvent business, and requires careful scrutiny. Even if the effect

is limited in this particular case because some of the other units in the debtor's business are unionized already, my colleague's decision would be a critical precedent of broader application. It is necessary to step back and consider the larger context.

D. THE GOVERNING PRINCIPLES

66 There are several avenues into the insolvency regime. An insolvent person's creditor can apply for a bankruptcy order (*BIA*, s. 43), or the insolvent person can make an assignment (*BIA*, s. 49). An insolvent person can make a proposal (*BIA*, s. 50) and if it fails, the result is bankruptcy (*BIA*, s. 57). As in this case, a secured creditor can apply to the court for the appointment of a receiver (*BIA*, s. 243). A qualified debtor corporation can make an application under the *CCAA*, which aims at restoring the health of the debtor company, if possible, as a going concern. However, if the company cannot be restored as a going concern, then the *CCAA* or the *BIA* can be used to liquidate the company and, once ordered into bankruptcy, the priorities of the creditors are determined under the *BIA*: see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.).

67 While each of these avenues into the insolvency regime has unique features, they also have several interlocking common elements that reflect important underlying principles.

68 First, the root principle is that creditors in the same class, including employees, are to be treated equally in relation to the distribution of the remaining assets of the estate. This is also known as the *pari passu* principle. It is reflected in s. 141 of the *BIA* and elsewhere: see *Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417 (S.C.C.); *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, [1990] S.C.J. No. 45 (S.C.C.), at para. 22.

69 Second, the date on which the respective rights of creditors are to be determined is the effective date of the bankruptcy, or the date of the appointment of the receiver, or the making of a *CCAA* order. As an incident of the *pari passu* principle, after the effective date no creditor is to be permitted to advance its position over that of similarly situated creditors.

70 Third, the administration of the debtor's assets is to be orderly. Central to the court's insolvency work is the ability to impose order on what would otherwise be a fractious and expensive free-for-all among the creditors intent on taking as much of the debtor's assets as soon as they could through self-help or litigation. To this end, the trustee or receiver is responsible for establishing a summary procedure for determining the validity and the value of the creditors' interests. This is to avoid exhausting a debtor's assets in defending a multiplicity of lawsuits, and to avoid distracting the trustee or receiver from the orderly administration of the estate. Hence, the "single proceeding model" for administrating claims expeditiously: see *Century Services*, at para. 22; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at paras. 33-34. In bankruptcy there is a "public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse", as Binnie J. noted in *Eagle River International Ltd., Re*, 2001 SCC 92, [2001] 3 S.C.R. 978 (S.C.C.), at para. 27.

71 For example, in *Essar Steel Algoma Inc., Re*, 2016 ONSC 1802, 35 C.B.R. (6th) 89 (Ont. S.C.J. [Commercial List]), the *CCAA* judge approved an expedited grievance arbitration process that was substantively the same as, but procedurally different from, the grievance arbitration process in the collective agreement. He did this over the objection of the union, relying on several cases including *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 68 (Ont. S.C.J. [Commercial List]) per Morawetz J., *White Birch Paper Holding Co., Re*, 2010 QCCS 2590, 65 C.B.R. (5th) 186 (C.S. Que.), *AbitibiBowater inc., Re*, 2010 QCCS 1065 (C.S. Que.), per Gascon J., as he then was, and *Canwest Global Communications Corp., Re*, 2011 ONSC 2215, 75 C.B.R. (5th) 156 (Ont. S.C.J. [Commercial List]) per Pepall J., as she then was, at paragraph 33. The union sought leave to appeal to this court in *Essar Steel*, which was rejected by Gillese J.A.: *Essar Steel Algoma Inc., Re*, 2016 ONCA 274, 36 C.B.R. (6th) 56 (Ont. C.A.). She considered the bankruptcy court's ability to expedite the grievance process to be well-settled law (at para. 33). I return to this case below in discussing the lurking constitutional issues.

72 The imposition of a stay of proceedings against the debtor is the insolvency regime's primary tool for establishing order. The stay is intended to preserve the status quo; it is "crucial to the orderly administration of the estate and ensures that a creditor will not benefit or improve his or her position at the expense of other creditors": F. Bennett, *Bennett on Bankruptcy*, 19th ed.

(Toronto: LexisNexis Canada Inc., 2016), at p. 377. See also R. J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009), at p. 152; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at p. 57.

73 A stay is imposed directly by ss. 69-69.3 of the *BIA* in defined circumstances, or by court order in conjunction with a receivership order under s. 243 of the *BIA* and s. 101 of the *CJA*, as in this case: see Wood, at p. 334. In *CCAA* proceedings, the stay is court-imposed under s. 11 *et seq.* of the *CCAA*: see e.g. *Nortel Networks Corp., Re*, 2009 ONCA 833, 99 O.R. (3d) 708 (Ont. C.A.), leave to appeal refused, (2010), [2009] S.C.C.A. No. 531 (S.C.C.), at para. 16; *Nortel Networks Corp., Re*, at para. 47; Wood, at pp. 333-34; Sarra, at pp. 51-52.

74 Order is also ensured by the court's ongoing supervision of the insolvency. Receivers appointed by court order under s. 243 of the *BIA*, and monitors appointed under s. 11.7 of the *CCAA*, are also supervised by the court in accordance with the terms of the appointing order: *Ma, Re* (2001), 143 O.A.C. 52 (Ont. C.A.). Finally, order is ensured by the prospect of lawsuits for misconduct, with leave of the court, against the trustee specifically under s. 37, and against the trustee or interim receiver under s. 215 of the *BIA*.

75 The fourth common element to each of the avenues into the insolvency regime is the existence of a process for managing exceptions. The court has discretion to lift the stay in circumstances where it is necessary. This is provided for in s. 69.4 and in s. 215 of the *BIA*. There is a difference in approach. Under s. 69.4 of the *BIA*, a person seeking leave need not prove a *prima facie* case, only that there are sound reasons, consistent with the scheme of the *BIA* to relieve against the automatic stay, whereas under s. 215 of the *BIA* the applicant must establish a *prima facie* case: Contrast *Ma*, at paras. 2-3, with *GMAC*, at para. 59.

76 With respect to receivers appointed by court order under the *BIA*, and monitors appointed under the *CCAA*, since the stay flows from the court's order, the court must be persuaded to lift the stay, and applies the same principles.

77 In discussing the appropriate analysis under s. 215 of the *BIA*, the Supreme Court noted in *GMAC* that the test involves a balancing of "the protection of trustees and receivers from the distraction and delay inherent in frivolous or merely tactical suits, and the preservation to the maximum extent possible of the rights of creditors and others as against a trustee or receiver" (at para. 61).

78 Whatever the applicable test, "lifting the automatic stay is far from a routine matter", as this court noted in *Ma*, at para. 3. I point out that the insolvency regime does not contemplate that each creditor will proceed by separate litigation after getting leave of the court. Indeed, even if a creditor, suing with leave, succeeds in getting judgment, it is still caught by the stay in respect of recovery. It must be kept in mind that the lifting of a stay is exceptional, in view of the expectation that most creditors' claims will be resolved through the summary procedure, and not through ongoing court or administrative law proceedings: see e.g. *Moloney*, at paras. 33-34; Bennett, at p. 378; *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 71.

79 These governing principles have a role to play in the exercise of a bankruptcy judge's discretion and in the proper disposition of this appeal.

E. THE APPLICATION JUDGE'S REASONS

80 Drawing on the principles set out above, the bankruptcy judge correctly sets the normative context in his decision, at para. 44:

> A receiver is a court-appointed officer whose role ideally is to take possession of the property of a debtor, to put the business of the debtor on a viable financial basis with a view to maintaining it in the short term, and to sell the business on a basis which maximizes the proceeds of sale available to satisfy the liabilities of the debtor to its creditors. To this end, a receiver is typically granted extensive powers, including the power to terminate the employment of employees who the receiver determines are not reasonably necessary for the conduct of the business to be sold. The stay of proceedings typically granted is designed to prevent particular creditors from improving their position relative to other creditors. It is also intended to permit the receiver to concentrate on its principal functions, all without the time and expense of litigation outside of any court-ordered claims process that is required within the receivership proceedings. In a broader sense, the stay therefore

freezes the rights and remedies of creditors as they existed as of the date of the receivership order. Any motion to lift a stay of proceedings should be assessed in relation to the extent that it furthers the purposes of receivership proceedings.

[Emphasis added.]

81 In explaining why he refused leave to the union to commence the certification application before the Ontario Labour Relations Board, the bankruptcy judge states, at para. 46, that the debtor's creditors must not be able to improve their relative positions, and reiterates that the date for determining the relative positions of the creditors is the date the receiver is appointed:

First, the effect of the Certification Application is to increase the rights of the members of the proposed bargaining unit relative to other creditors of the Debtor. I accept that, if the Certification Application were granted, the Union has agreed, subject to its discretion, to postpone negotiation of a collective agreement under certain conditions for a certain period of time. Nevertheless, the effect of the Certification Application is to create rights in favour of employees that did not exist at the date of the Receivership Order. As the proposed bargaining unit had not been certified by the OLRB, the employees of the Ontario Disposal division did not have the right to bargain for a collective agreement. Commencement of the Certification Application would therefore be contrary to the policy and purpose of the stay of proceedings, which, as mentioned, effectively freezes the rights and remedies of all creditors of the Debtor as of the date of the Receivership Order.

[Emphasis added.]

82 The bankruptcy judge also refers to a practical reason for refusing to lift the stay "based in the purpose and policy of receivership proceedings" (at para. 47). He points out that recognition of the proposed bargaining unit by the Labour Relations Board "could impact the sales proceeds" (at para. 48). In his view: "it is inequitable to require creditors to accept a potential diminution of the value of the assets in circumstances where employees assert rights not previously in existence while the rights and remedies of the remaining stakeholders are frozen" (at para. 48).

83 Finally, with respect to the union's unfair labour practice claim, the bankruptcy judge finds, at para. 57: "unless the Certification Application was validly commenced, the Union cannot assert that the employees were terminated in response to such action." Since he would not have lifted the stay to permit the certification application to proceed *nunc pro tunc*, there was no factual basis for the unfair labour practice claim.

F. THE PRINCIPLES APPLIED

84 As a commercial list judge with long experience in insolvency, the bankruptcy judge would be fully alive to the relevant law and to the business realities faced by the debtor, the creditors and the receiver. Moreover, he would be intimately familiar with the particular facts of the case. That is why it is important for this court, from the viewpoint of the standard of review, to defer to the bankruptcy judge in the exercise of his discretion under s. 215 of the *BIA* or the terms of the receivership order: see e.g. *Royal Crest Lifecare Group Inc., Re* (2004), 181 O.A.C. 115 (Ont. C.A.), leave to appeal refused, [2004] S.C.C.A. No. 104 (S.C.C.), at para. 23; *Grant Forest*, at paras. 97-99.

85 Did the bankruptcy judge err in principle or exercise his discretion unreasonably? My colleague says that he did. I disagree.

86 In this part of my reasons I begin with the *Charter* issue, continue with the doctrine of paramountcy, and then attend to the reconciliation of the *BIA* and labour law, specifically the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A ("*LRA*"), the *pari passu* principle, the effect of certification on sale proceeds, and the issue of prejudice.

(1) The Charter Issue

87 More atmospherically than substantively, in aid of its argument that s. 72 of the *BIA* obliges the bankruptcy court to give full effect to the *LRA* bargaining rights and process, the union enlists the 2015 labour trilogy of the Supreme Court of Canada: *Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (S.C.C.) ("*MPAO*"); *Royal Canadian Mounted Police v. Canada (Attorney General)*, 2015 SCC 2, [2015] 1 S.C.R. 125 (S.C.C.); *SFL v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 (S.C.C.). The appellant quotes para. 58 of *MPAO* in which

the court states that the purpose of the *Charter* s. 2(d) guarantee of associational rights is: "to protect individuals against more powerful entities." The court stated: "By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires." The court added: "In this way, the guarantee of freedom of association empowers vulnerable groups," including employees, "and helps them work to right imbalances in society."

88 The appellant's factum simply asserts that: "Given the constitutional protection afforded to this process, the court should be wary of allowing the existence of a receivership to frustrate the certification application." Fair enough, but the union had the entire life of the business before insolvency within which to pursue certification.

89 In oral argument, counsel for the union expanded on this brief allusion. He asserted that the *MPAO* decision constitutionalized bargaining rights, and argued that the right of employees to unionize should "supersede" any concern in relation to the sale of the business. He added that there is no empirical evidence that unionization will reduce the sale value of the asset, but even if that were to be the outcome of the employees' exercise of their rights under the labour legislation: "So be it."

90 However, counsel for the union did not take the position that the constitutionalization of labour rights takes away entirely the bankruptcy court's discretion under s. 215 of the *BIA* or the order appointing the receiver to refuse to lift the stay where labour rights are in issue. He acknowledged that "sometimes the discretion must be exercised" and cited *Hawkair Aviation Services Ltd., Re*, 2006 BCSC 669, 22 C.B.R. (5th) 11 (B.C. S.C. [In Chambers]).

91 In *Hawkair*, the union sought to certify just before the company was to bring forward its reorganization plan under the *CCAA*. The *CCAA* court concluded that in the context the prejudice to the union was minimal while the prejudice to the creditors was great. By contrast, the union points out that in this case there is no imminent reorganization and there is no empirical evidence of prejudice.

92 In my view, this constitutional issue was not properly joined before the bankruptcy judge, nor before this court. It is not sufficient to simply allude to associational rights under s. 2(d) of the *Charter* and to the 2015 labour trilogy and assert they are dispositive. A similar argument was made in *Essar Steel* to the effect that the grievance provisions of the collective agreement were not subject to the *CCAA* stay. The constitutional argument was more fully developed in that case, and the *CCAA* court's rejection of it was approved by this court.

93 In my view, giving unions carte blanche to begin certification efforts for insolvent enterprises after the date of the appointment of a trustee or receiver or the date of an order under the *CCAA* would effect a sea change in insolvency law; it would profoundly alter the economic dynamics of insolvency, and whether the *CCAA* route is preferable to outright bankruptcy. The consensus is that the *CCAA* has been effective in salvaging businesses and jobs, including union jobs. It would be unwise for this court to sanction such a profound change in the absence of full evidence and argument addressing both whether the s. 2(d) *Charter* right of employees has been substantially limited in the insolvency context, and whether any such limit is demonstrably justified under s. 1 of the *Charter*: see *Gordon v. Canada (Attorney General)*, 2016 ONCA 625, 404 D.L.R. (4th) 590 (Ont. C.A.), leave to appeal refused, (2017), [2016] S.C.C.A. No. 444 (S.C.C.); (2017), [2016] S.C.C.A. No. 445 (S.C.C.). The issue is too important to the insolvency regime and too complex for the drive-by analysis the union proposes.

94 In the article "From Deterrence to Détente", the authors specifically refer to "the acquisition of collective bargaining rights", as one of the new fronts in the "battle" they describe between employees and the other creditors of an insolvent business.

(2) The Role of Paramountcy

95 In support of his view that the *Labour Relations Act* must be given full operational scope in this case, my colleague relies on the underlined words in s. 72 of the *BIA*, which provides:

> 72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

[Emphasis added.]

96 He draws support from the words of Abella J. who said in *GMAC* that s. 72 of the *BIA* "is not intended to extinguish legally protected rights unless those rights are in conflict" with the *BIA* (at para. 47). The appellant also points to para. 51 of *GMAC*, where Abella J. quoted *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60 (S.C.C.), at para. 43:

> [E]xplicit statutory language is required to divest persons of rights they otherwise enjoy at law ... So long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights.

97 My colleague concludes that there must be an operative conflict before the principle of paramountcy can give the *BIA* priority over the *LRA*, and asserts there is no such conflict here.

98 I disagree with his construal of paramountcy and his assessment that no conflict exists on the facts of this case. Neither *Crystalline* nor *GMAC* is the latest word from the Supreme Court on paramountcy.

99 The doctrine of paramountcy must be sensitive to the context in which it operates. There are two distinct branches to the test, as explained by Gascon J. in *Moloney*, which he echoed in the companion case *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.). At para. 18 of *Moloney*, Gascon J stated:

> A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.

100 He explained, at para. 25:

> In Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, the Court formulated what is now considered to be the second branch of the test. It framed the question as being "whether operation of the provincial Act is compatible with the federal legislative purpose" (p. 155). In other words, the effect of the provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions": Western Bank, [*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3. at para. 73.

101 Justice Gascon noted, at para. 29, that "if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict." He added: "Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law (citations omitted)." In remedial terms, he stated: "In practice, this means that the provincial law remains valid, but will be read down so as to not conflict with the federal law, though only for as long as the conflict exists."

(3) Reconciling the BIA and the Labour Relations Act

102 In this case, two distinct regulatory regimes come into contact: the Ontario labour relations regime, and the federal insolvency regime. There is no operative incompatibility or conflicting language on the facts of this case to engage the first branch of the paramountcy analysis. However, in my view the second branch is engaged, under which the bankruptcy judge is obliged to consider the exigencies of each regime and reconcile them if possible.

103 The court's task here is not to reconcile statutory language, but to reconcile different policies. This is a nuanced, difficult and delicate task informed by the bankruptcy judge's knowledge both of the law and the operation of the marketplace in the context of the specific matter before him, drawing also on his experience and wisdom, and his sense of what is commercially reasonable. The bankruptcy judge brought just that perspective to this case, as I will explain.

104 Bankruptcy judges have proven to be adept at managing the interface between the two regulatory regimes. A good example is *Essar Steel*, where the *CCAA* judge found a way to reconcile grievance arbitration required by the collective agreement with the restructuring need for speed, expediency and reduced process costs.

105 It is worth pointing out that s. 33 of the *CCAA*, which came into force in 2009, directly addresses collective agreements. Subsection 33(1) provides:

> 33.(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.
>
> [Emphasis added.]

106 Can anything be drawn from this provision? It plainly assumes a collective agreement is in existence at the date proceedings are commenced and does not contemplate a new certification. This is a reasonable assumption for insolvency proceedings in general, built as they are to preserve the status quo.

(4) The Pari Passu Principle

107 In my view, the policy contest presented in this case is precisely the kind of conflict between provincial regulatory regime for labour relations and the federal insolvency regime that the paramountcy doctrine is intended to recognize and accommodate.

108 My colleague relies on the Supreme Court's decision in *GMAC* . In that case the issue was whether leave should be granted to the union under s. 215 of the *BIA* so that the Labour Relations Board could determine "successor employer" status.

109 However, there is a crucial distinction between this case and *GMAC* . The union had long been certified in *GMAC* . By contrast, in this case, the certification effort followed the appointment of the receiver by several months. This distinction is important because it engages one of the fundamental policy principles in insolvency law, which is to preserve the status quo among the creditors as of the date the receiver was appointed. The bankruptcy judge accurately identified that this principle would be violated if the debtor could be forced to accept union certification post-bankruptcy. In my view, my colleague does not give due weight to this critical principle.

110 In particular, my colleague says the bankruptcy judge was wrong to refuse leave on the basis that the certification application would effectively increase the rights of the members of the post bargaining unit relative to the other creditors. He takes the view that "certification does not have the effect of automatically increasing the rights employees have as creditors, thereby prejudicing other creditors."

111 I take a different view. It seems quite plain that neither the employees nor the union would be pursuing certification if it did not provide an advantage in the bankruptcy process. While a successful certification application does not guarantee employees better wages or working conditions, their enhanced bargaining power is surely what unionization is all about: see *MPAO*, at para. 70.

112 The union's offer, as the bankruptcy judge notes, is this: "*subject to its discretion*, to postpone negotiation of a collective agreement *under certain conditions for a certain period of time*" (my emphasis), in effect to delay bargaining the first collective agreement for up to a year. This offer is plainly tactical, and the fact it was made at all simply underlines the force of the point that the union expects enhanced bargaining power to be effective in the insolvency.

113 In addition to the operation of successor rights, and access to unfair labour practice remedies, the court must take cognizance of the significant protections given to a union seeking to negotiate a first collective agreement, which may include the imposition of such an agreement through arbitration ordered by the Labour Board under s. 43 of the *Labour Relations Act*. This is distinct from the more limited protections provided to the union in subsequent negotiations.

(5) The Effect of Certification on the Sale Proceeds

114 In its first report to the court, the receiver advised:

> The Receiver has no long-term business goals or strategic plans for the Debtors' assets. Given the temporary nature of its appointment and its mandate to maximize realizations for the benefit of all stakeholders by, ideally, selling the Debtors' businesses as going concerns, the Receiver (unlike an ultimate purchaser) is fundamentally ill-equipped to evaluate the certification application properly nor to bargain collectively. Moreover, the Receiver is seriously concerned that any decision it makes or agreement it enters into with the Union will be unacceptable to prospective purchasers and will suppress realizations.
>
> The collective bargaining process, if permitted to proceed, will also add significant professional costs to the Receiver's administration. The cost of a labour negotiation will, in effect, be a super-priority expense that will ultimately be absorbed by and materially prejudice other creditors through reduced realizations and distributions.

115 My colleague disputes the application judge's reasoning that certification of the bargaining unit could negatively impact a sale of the Harmony Road depot to the prejudice of all the creditors, on the basis that "this line of reasoning is speculative". He asserts that "while some purchasers may be dissuaded by recognition of the proposed bargaining unit, it may also be that a set collective agreement, with the clarity of terms, would be attractive to the perspective purchaser", and adds that: "the receiver's statement in its first report that it has 'serious concerns' that certification could negatively impact a sale amounts a little more than self-serving speculation".

116 In my view, the bankruptcy judge's statement that certification could negatively impact the sale of the Harmony Road depot is self-evidently true and falls well within the margin of appreciation that is his due, given his knowledge of the commercial realities. I would be most reluctant to disparage the advice of the court-appointed receiver as mere "self-serving speculation". Such an officer has no self-interest and owes duties to all the parties and to the court. In my view, it was open to the bankruptcy judge to accept the receiver's advice.

117 If the union achieves certification and the Harmony Road depot is sold in such a way as to attract successor labour rights, then any prospective purchaser of the depot will be faced with the obligation to immediately embark on first collective agreement negotiations. This is not a small additional burden on what would otherwise be the terms and conditions of the depot's sale. It will plainly discourage some potential bidders and therefore negatively affect the depot's market price by reducing the number of buyers who would be willing to engage. Any cooling of the interests of potential purchasers in the debtor's assets would reduce the proceeds of sale to the prejudice of all the creditors. With respect, this is more than a mere "inconvenience to the receivership process."

118 If the court were to permit the post-receivership certification process to continue, it would effectively hand one interested group of creditors, the newly unionized employees, a tool with which to increase their leverage over the other creditors.

(6) The Role of Prejudice

119 I agree with my colleague that the bankruptcy judge's decision does prejudice the employees and the union, at least measured by how certification would work if there were no insolvency. But that is not the right measure under the *BIA*.

120 While it was possible in *GMAC* and *Essar Steel* to give considerable scope to the operation of the labour relations regime in relation to *existing collective agreements*, the bankruptcy judge concluded it was not desirable in this case because so many essential insolvency principles would be violated. This is a valid consideration, as the Supreme Court noted in *Moloney* and in *407 ETR* .

121 There is limited scope for accommodating a certification effort after the receiver's appointment, because doing so would contradict bedrock insolvency principles. In his reasons, the bankruptcy judge identifies the central question as whether "unions have a right to commence certification applications during receiverships" (at para. 41). The bankruptcy judge's implicit response

is that there is no universal answer; it is a case-specific issue for the judge to determine based on the facts. I agree. I would defer to the bankruptcy judge's judgment in the context of this case.

(7) The Unfair Labour Practice Complaint

122 The bankruptcy judge showed that the unfair labour practice allegation was linked to the certification effort. In a factual sense there is no doubt that had the certification effort not started, there would have been no basis for an unfair labour practice allegation. If the certification effort was misguided, as he found, then there is no basis whatever for the complaint. Again, I would defer to the bankruptcy's judge's decision.

G. DISPOSITION

123 I would dismiss the appeal respecting the bankruptcy judge's refusal to lift the stay both with respect to the union certification process, and the unfair labour practice complaint.

Appeal allowed.

Footnotes

1 At the appeal hearing, the court heard argument on the two preliminary issues. The court determined that the union could not bring its appeal as of right under s. 193(a) or (c) of the *BIA*. However, the court granted the union leave to appeal pursuant to s. 193(e) of the *BIA*. The court announced that reasons supporting these two conclusions would follow in the judgment on the main appeal.

TAB 2

Most Negative Treatment: Check subsequent history and related treatments.

2012 ONSC 7319
Ontario Superior Court of Justice [Commercial List]

Peoples Trust Co. v. Rose of Sharon (Ontario) Retirement Community

2012 CarswellOnt 16827, 2012 ONSC 7319, 19 C.L.R. (4th) 1, 224 A.C.W.S. (3d) 323, 97 C.B.R. (5th) 303

Peoples Trust Company (Applicant) and Rose of Sharon (Ontario) Retirement Community (Respondent)

D.M. Brown J.

Heard: December 21, 2012
Judgment: December 27, 2012
Docket: CV-11-9399-00CL

Counsel: C. Prophet, C. Stanek for Receiver, Deloitte & Touche Inc.
R. Jaipargas for Trisura Guarantee Insurance Company

Subject: Civil Practice and Procedure; Insolvency; Contracts; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Lifting stay — General contractor began proceedings against condominium — Receiver was appointed over condominium and proceedings stayed pursuant to Bankruptcy and Insolvency Act — Default judgment was granted in favour of contractor — Contractor brought motion to set aside stay — Motion granted — Receiver did not object to claim but on condition of setting aside default judgment — Lien claim would expire if stay not lifted — Default judgment was likely made without knowledge of appointment and was in contravention of its terms — Court had authority to determine all matters touching on receivership — Receiver met test for setting aside stay under s. 54(3) of Construction Lien Act, and default and noting in default were set aside.

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Miscellaneous

General contractor began proceedings against condominium — Receiver was appointed over condominium and proceedings stayed pursuant to Bankruptcy and Insolvency Act — Default judgment was granted in favour of contractor — Contractor brought motion to set aside stay — Motion granted — Receiver did not object to claim but on condition of setting aside default judgment — Lien claim would expire if stay not lifted — Default judgment was likely made without knowledge of appointment and was in contravention of its terms — Court had authority to determine all matters touching on receivership — Receiver met test for setting aside stay under s. 54(3) of Construction Lien Act, and default and noting in default were set aside.

Table of Authorities

Cases considered by *D.M. Brown J.*:

A1 Equipment Rental Ltd. v. Borkowski (2008), 2008 CarswellOnt 1717, 70 C.L.R. (3d) 274 (Ont. S.C.J.) — considered

Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd. (2010), 2010 ABQB 199, 2010 CarswellAlta 2518 (Alta. Q.B.) — referred to

M.J. Dixon Construction Ltd. v. Hakim Optical Laboratory Ltd. (2009), 2009 CarswellOnt 1671, 79 C.L.R. (3d) 144 (Ont. Master) — considered

Ma, Re (2001), 143 O.A.C. 52, 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4(a) [en. 1992, c. 27, s. 36(1)] — considered

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

s. 37 — considered

s. 37(1) — considered

s. 37(1) ¶ 1 — considered

s. 37(1) ¶ 2 — considered

s. 54(3) — considered

s. 67(3) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 19.03(1) — considered

MOTION by creditor set aside stay of proceedings due to receivership in action under *Construction Lien Act.*

***D.M. Brown J.*:**

I. Motion to lift stay in a receivership in order to set down for trial a construction lien action

1 On September 27, 2011, C. Campbell J. appointed Deloitte & Touche Inc. receiver and manager of all the assets, undertakings and properties of Rose of Sharon (Ontario) Retirement Community. Paragraph 8 of the Appointment Order contained the standard clause staying proceedings against the debtor.

2 Rose of Sharon owned a long-term care condominium located on Maplewood Avenue, Toronto. Prior to the appointment of the Receiver construction lien litigation had broken out over the condominium project and the general contractor, Mikal-Calladan Construction Inc., had initiated lien proceedings. On January 30, 2012, Trisura Guarantee Insurance Company obtained an assignment of Mikal-Calladan's lien. On November 26, 2012, Trisura obtained an order to continue the construction lien action. As required by the terms of section 37 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, Trisura must set the construction lien action down for trial by December 31, 2012, failing which its lien will expire.

3 Trisura therefore moved for an order lifting the stay of proceedings to allow it to pursue the construction lien action so that it can set the action down for trial.

4 The Receiver did not oppose the lifting of the stay, but it sought certain terms for the order. Trisura has agreed to all the terms, but one — whether as a condition of lifting the stay this Court should set aside a default judgment granted against Rose of Sharon some two days after the Appointment Order was made and the earlier noting in default of Rose of Sharon.

II. Governing legal principles governing the lifting of stays

5 On a motion to lift a stay of proceedings in a receivership the moving party bears the onus of convincing the court that the relief should be granted, and in considering such a request the court should look at the totality of the circumstances and the relative prejudice to both sides. [1] The parties agreed that the court may find guidance in the jurisprudence which has developed around requests to lift stays imposed by the *Bankruptcy and Insolvency Act*. Section 69.4(1) of the *BIA* provides that a court may declare that the statutory stays no longer operate, "subject to any qualifications that the court considers proper", where the court is satisfied that the creditor is likely to be materially prejudiced by the continued operation of the stays or that it is

equitable on other grounds to make such a declaration. In *Ma, Re*[2] the Court of Appeal set out the basic considerations on a request to lift a stay under *BIA* s. 69.4:

> Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied
>
> (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or
>
> (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):
>
> > In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.
>
> As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a prima facie case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

III. The basic chronology

6 Mikal-Calladan preserved a Claim for Lien on November 19, 2010 against title to the Project. It perfected its lien by commencing the construction lien action — CV-10-417426 — on December 31, 2010. On July 21, 2011, Peoples Trust served a statement of defence in the Lien Action. Rose of Sharon was noted in default in the Lien Action; exactly when, the materials did not disclose.

7 On August 31, 2011, with the consent of Peoples Trust, the parties agreed to refer the Lien Action to a construction lien master in Toronto for a trial. MacDonald J. made a standard Reference Order on that day which provided that "the Master determine all questions arising in this action on the reference".

8 Then, less than a month later, at the suit of Peoples Trust, the Appointment Order was made.

9 On September 12, 2011, before the Appointment Order was made, Mikal-Calladan had requisitioned default judgment against Rose of Sharon. On September 29, two days after the Appointment Order was made, the Registrar signed default judgment against Rose of Sharon for $4,195,768.64, plus costs of $1,350.00 (the "Default Judgment").

10 As mentioned, earlier this year Trisura took an assignment of Mikal-Calladan's Lien Claim and obtained an order to continue the Lien Action about a month ago.

11 With the December 31 deadline looming to set down the Lien Action or face the expiry of its lien, on November 7, 2012 Trisura's counsel wrote to the Receiver's requesting that the Receiver consent to a lifting of the stay so it could set the Lien Action down for trial. Trisura's counsel indicated that "the main issue in the lien action relates to the priority of the lien over the People's Trust mortgage".

12 Receiver's counsel responded on November 22, 2012 advising that the Receiver was prepared to consent to lifting the stay on the following terms:

> Condition 1: Trisura obtained an order to continue in the Lien Action;

Condition 2: Trisura agreed to set aside the noting in default of Rose of Sharon and the Default Judgment so that the Receiver could defend the Lien Action;

Condition 3: Issues of liability, timeliness and quantum in the Lien Action would be determined in a Reference before a Master; and,

Condition 4: The issue of the priorities of the construction lien vis-à-vis any other encumbrance would be determined by a judge of the Commercial List.

13 Mr. Edouard Chassé, a claims adjuster retained by Trisura, in his affidavit stated that Trisura had obtained an order to continue and it agreed to Conditions 3 and 4. Trisura opposed Condition 2 "as the Receiver has had notice of the default for 14 months and has taken no steps" to set aside the noting in default and default judgment.

IV. Analysis

14 There is no doubt that if the stay is not lifted, Trisura would be prejudiced materially by losing its ability to advance its lien claim. Section 37(1) of the *Construction Lien Act* provides that a perfected lien, such as that assigned to Trisura, expires immediately after the second anniversary of the commencement of the lien action unless either (i) an order is made for the trial of an action in which the lien may be enforced or (ii) an action in which the lien may be enforced is set down for trial. December 31, 2012 is the second anniversary of the commencement of the Lien Action, so unless the stay is lifted, Trisura's lien claim will expire. As mentioned, the Receiver has consented to the lifting of the stay, so the remaining dispute centres only around Condition 2 — the Receiver's requirement that the noting of default and Default Judgment against Rose be set aside.

15 Trisura advanced two arguments why no setting aside should occur. First, Trisura argued that because the August 31, 2011 Reference Order of MacDonald J. stipulated that "the Master determine all questions arising in this action on the reference and all questions arising under the *Construction Lien Act*", it was not open to the court supervising the receivership proceedings to set aside a noting of default which had occurred in the Lien Action.

16 I disagree, for two reasons. First, the Default Judgment was made two days after the Appointment Order. No doubt that occurred because the papers requisitioning the Default Judgment were moving through the court's administrative office and the Registrar was unaware of the Appointment Order. Nonetheless, given the stay of proceedings ordered in the Appointment Order, the Default Judgment contravened the Appointment Order and therefore was of no force or effect.

17 Second, Trisura's submission ignored what occurred less than one month after MacDonald J. made his Reference Order — this receivership came about. As a result of the Appointment Order, the court supervising the receivership considers all issues relating to or touching upon the receivership and therefore is the proper court to determine whether, as a condition of lifting a stay of proceedings, certain relief should be granted to the receiver as part of the process of balancing the respective interests at stake on the lift-stay motion.

18 Which brings me to the second argument made by Trisura: it contended that the appropriate test for considering whether to set aside a noting in default in a construction lien action is that set out in the *Construction Lien Act* and the related jurisprudence and, in the circumstances of this case, the Receiver could not meet that test. Section 54(3) of the *CLA* provides that where a defendant has been noted in default, it shall not be permitted to contest the claim "except with leave of the court, to be given only where the court is satisfied that there is evidence to support a defence". Section 67(3) of the *CLA* states that "except where inconsistent with this Act...the *Courts of Justice Act* and the rules of court apply to pleadings and proceedings under this Act."

19 In *M.J. Dixon Construction Ltd. v. Hakim Optical Laboratory Ltd.*, Master Polika held that Rule 19.03(1) of the *Rules of Civil Procedure* dealing with the setting aside of notings in default was inconsistent with *CLA* s. 54(3) because it was less stringent than the test under the *CLA* by reason of granting the court a discretion to set aside a noting of default on such terms as were just. Master Polika stated that the sole test a party moving to set aside the noting of default in a construction lien action needed to meet was that set out in *CLA* s. 54(3) — i.e. to satisfy the court that there existed evidence to support a defence.[3] In

AI Equipment Rental Ltd. v. Borkowski Lederer J. stated that a party moving to set aside a noting in default under the *CLA* must not only demonstrate that evidence existed to support a defence, it also had to move promptly to set aside the noting in default. [4]

20 Whether, when a lien claimant seeks leave of the court supervising a receivership to lift the stay of proceedings and the receiver seeks a condition that a noting of default be set aside, the court must apply the test under *CLA* s. 54(3) or may proceed on a less stringent basis as part of its discretion in lifting the stay, is a question I need not determine for the simple reason that on the facts of this case the Receiver meets the test under the *CLA*.

21 Trisura submitted that the Receiver cannot now attempt to impose a condition setting aside the noting of default when over a year has passed since that event. The evidence does not support that contention. First, just over a week after the making of the Appointment Order, counsel for Mikal-Calladan wrote to Receiver's counsel advising of the Default Judgment and stating:

> Under the circumstances, we will not take any steps to enforce our client's judgment in the absence of obtaining the necessary leave from the Court.

In light of that position taken by the lien claimant, it is not surprising that the Receiver took no immediate steps to set aside the Default Judgment or the noting in default.

22 In its First Report dated December 12, 2011 the Receiver reported:

> While there may be setoffs against Mikail's claim that may be asserted by the Receiver, pending disposition of the Property, the Receiver does not intend to take any action in connection with any of the above-noted lien claims at this time.

Again, this constitutes evidence of a reasonable explanation by the Receiver about why it did not take steps at the time in the Lien Action.

23 On February 29, 2012, Trisura advised the Receiver of the assignment of the Lien Claim, but then took no further steps to move the Lien Action along until October 24, 2012 when it informed the Receiver that it wished to obtain a trial date. Further emails between counsel ultimately resulted in the Receiver's November 22, 2012 letter setting out the terms for lifting the stay of proceedings. In those circumstances, I see no argument that the Receiver failed to take steps promptly to set aside the noting in default once it became aware of Trisura's intention to proceed with the Lien Action. I also would note, by way of chronology, that on September 14, 2012, a month before Trisura approached the Receiver about further steps in the Lien Action, the Receiver had commenced a claim against Trisura under the performance bond for the Project.

24 As to whether the Receiver has filed evidence to support a defence, it has. Although the Receiver has not filed a draft Statement of Defence, the Receiver provided Trisura with ample details of its defence through its July 10, 2012 letter to Trisura's counsel, in particular the sections entitled "Set-Offs" and "Deficiencies", as well as in portions of its Statement of Claim in the performance bond action, specifically paragraphs 42 and 62 of the claim.

25 In balancing the interests of Trisura and the Receiver on this motion to lift the stay of proceedings, I conclude that it is fair and appropriate to require, as a term of lifting the stay, that both the noting of default of Rose of Sharon and the Default Judgment be set aside, and that the Receiver be permitted to file a Statement of Defence in the Lien Action within 20 days.

V. Summary and costs

26 By way of summary, I grant the motion of Trisura to lift the stay of proceedings contained in the Appointment Order to allow it to pursue the Lien Action, including allowing Trisura to set the Lien Action down for trial. Out of an abundance of caution, given the proximity of the December 31 deadline, I also order the trial of the Lien Action. As conditions for lifting the stay I order as follows:

> (i) the noting in default of Rose of Sharon and the Default Judgment against it are set aside so that the Receiver can defend the Lien Action;

(ii) the Receiver may file a Statement of Defence in the Lien Action within 20 days;

(iii) the issues of liability, timeliness and quantum in the Lien Action shall be determined in a Reference before a Master; and,

(iv) the issue of the priorities of the construction lien vis-à-vis any other encumbrance shall be determined by a judge of the Commercial List in these receivership proceedings.

As to costs, the conditions sought by the Receiver in its November 22, 2012 letter were reasonable. There really was no need for a contested motion. Accordingly, I grant the Receiver its costs of this motion fixed at $4,000.00 payable by Trisura within 20 days of the date of this Order. I am available at a 9:30 appointment tomorrow, Friday, December 28, 2012, to issue this order, if required.

Motion granted.

Footnotes

1 *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 199 (Alta. Q.B.), paras. 13 and 14.

2 (2001), 24 C.B.R. (4th) 68 (Ont. C.A.), paras. 2 and 3.

3 (2009), 79 C.L.R. (3d) 144 (Ont. Master), para. 24.

4 (2008), 70 C.L.R. (3d) 274 (Ont. S.C.J.), para. 51.

TAB 3

2012 ONSC 6664
Ontario Superior Court of Justice [Commercial List]

G.E. Canada Equipment Financing G.P. v. Northern Sawmills Inc.

2012 CarswellOnt 15077, 2012 ONSC 6664, 100 C.C.P.B. 182, 223 A.C.W.S. (3d) 628, 95 C.B.R. (5th) 46

G.E. Canada Equipment Financing G.P. (Applicant); Northern Sawills Inc. (Respondent); Application Under Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985 c. C-36 and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43

Newbould J.

Heard: November 19, 2012
Judgment: November 26, 2012
Docket: CV10-9042-00CL

Counsel: Mary Paterson, for Receiver PricewaterhouseCoopers Inc.
Elizabeth Pillon, Maria Konyukhova, for G.E. Canada Equipment Financing G.P.
Kristina Desimini, for Lucky Star Holdings Inc.
Stuart Brotman, for Morneau Shepell Ltd.
Mark E. Bailey, for Financial Services Commission of Ontario

Subject: Insolvency; Corporate and Commercial; Employment; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous

Receiver was appointed, completed sale process, and liquidated substantially all assets of employer N Inc. — At issue was what reserves were required for normal costs and wind-up deficiencies in N Inc.'s hourly and salaried defined benefit pension plans — Plan administrator made s. 81.6 Bankruptcy and Insolvency Act claim and Pension Benefits Act deemed trust claim — Receiver brought motion for advice and direction to resolve disputes delaying finalizing distributions, order authorizing distributions, and order approving activities, accounts, and disbursements — It was determined that there was no purpose in lifting stay contained in initial receivership order to permit consideration by superintendent to change wind-up date of hourly plan — In view of fact that wind-up date for hourly plan could not be changed, amount of holdback agreed to for salaried plan of $147,732 was sufficient for s. 81.6 salaried plan claim — If largest secured creditor wished to pursue it, motion could be brought requesting that holdback be terminated — It was determined that receiver need not hold back any amount for Personal Property Security Act s. 30(7) deemed trust claim — Activities of receiver in its fifth report and supplement were approved, as were its fees and disbursements and those of its counsel — Receiver could make distributions in accordance with schedule in supplement, which incorporated holdback of $147,732 for potential s. 81.6 claim.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Miscellaneous

Receiver was appointed, completed sale process, and liquidated substantially all assets of employer N Inc. — At issue was what reserves were required for normal costs and wind-up deficiencies in N Inc.'s hourly and salaried defined benefit pension plans — Plan administrator made s. 81.6 Bankruptcy and Insolvency Act claim and Pension Benefits Act deemed trust claim — Receiver brought motion for advice and direction to resolve disputes delaying finalizing distributions, order authorizing distributions, and order approving activities, accounts, and disbursements — It was determined that there was no purpose in lifting stay contained in initial receivership order to permit consideration by superintendent to change wind-up date of hourly plan — In view of fact that wind-up date for hourly plan could not be changed, amount of holdback agreed to for salaried plan of $147,732 was sufficient for s. 81.6 salaried plan claim — If largest secured creditor wished to pursue it, motion could be brought requesting that holdback be terminated — It was determined that receiver need not hold back any amount for Personal Property Security Act s. 30(7) deemed trust claim — Activities of receiver in its fifth report and supplement were approved, as

were its fees and disbursements and those of its counsel — Receiver could make distributions in accordance with schedule in supplement, which incorporated holdback of $147,732 for potential s. 81.6 claim.

Table of Authorities

Cases considered by *Newbould J.*:

Chandler v. Assn. of Architects (Alberta) (1989), [1989] 6 W.W.R. 521, 36 C.L.R. 1, [1989] 2 S.C.R. 848, 70 Alta. L.R. (2d) 193, 40 Admin. L.R. 128, 62 D.L.R. (4th) 577, 99 N.R. 277, 101 A.R. 321, 1989 CarswellAlta 160, 1989 CarswellAlta 620 (S.C.C.) — considered

General Motors Corp. v. Tiercon Industries Inc. (2005), 2005 CarswellOnt 4156, 35 R.P.R. (4th) 268 (Ont. S.C.J.) — referred to

Ma, Re (2001), 143 O.A.C. 52, 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68 (Ont. C.A.) — considered

Nortel Networks Corp., Re (2010), 2010 CarswellOnt 1597, 2010 ONSC 1304, 65 C.B.R. (5th) 231 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2010), 83 C.C.P.B. 52, 67 C.B.R. (5th) 21, 2010 CarswellOnt 4112, 2010 ONCA 464 (Ont. C.A.) — referred to

Village Green Lifestyle Community Corp., Re (2007), 45 C.C.L.I. (4th) 302, 27 C.B.R. (5th) 199, 2007 CarswellOnt 654 (Ont. S.C.J.) — referred to

Statutes considered:

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

Generally — referred to

s. 81.6 [en. 2005, c. 47, s. 67] — considered

s. 81.6(1)(c)(i) [en. 2005, c. 47, s. 67] — considered

s. 81.6(2) [en. 2005, c. 47, s. 67] — considered

s. 243(1) — referred to

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

Generally — referred to

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

s. 101 — referred to

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

s. 248(2) — referred to

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

Generally — referred to

s. 18(1)(b) — referred to

s. 57(4) — referred to

s. 57(5) — referred to

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

s. 1(1) "account" — referred to

s. 30(7) — considered

Regulations considered:

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

General, R.R.O. 1990, Reg. 909

s. 47(3) ¶ 5 — referred to

Words and phrases considered:

account

In its factum [the pension plan administrator] stated that the deemed trust might apply to the amount in a GIC account that the Receiver was proposing to distribute to secured creditors. However, it appears clear from the definition of "account" in the [*Personal Property Security Act*, R.S.O. 1990, c. P.10] that an account does not include a GIC.

MOTION by receiver for advice and direction to resolve disputes delaying finalizing distributions, order authorizing distributions, and order approving activities, accounts, and disbursements.

Newbould J.:

1 PwC was appointed as Receiver over the assets of Northern Sawmills Inc. in January 2011. It has completed a sale process and liquidated substantially all of the Northern assets. Once certain disputes are resolved, the Receiver will be able to finalize its distributions to the secured lenders. The Receiver brings this motion seeking (1) advice and direction to resolve disputes that are delaying finalizing distributions, (2) an order authorizing the Receiver to make certain distributions, and (3) an order approving its activities and its accounts and disbursements and those of its counsel.

2 A total of $1,623,614 is available for distribution by the Receiver. Of this amount, and in accordance with the Receiver's Charge as provided in the initial receivership order and a prior arrangement with Morneau, the costs of the Receiver are to rank in priority to all other charges and claims. The balance of the proceeds, less property taxes to be paid, total $498,181.20.

3 The issue is what reserves are required for normal cost and wind-up deficiencies in Northern's Hourly and Salaried Plans. Morneau Shepell Ltd ("Morneau") as Plan Administrator makes two claims: (1) a section 81.6 *Bankruptcy and Insolvency Act* ("BIA") claim and (2) a *Pension Benefit Act* ("PBA") deemed trust claim.

4 PwC was appointed on January 4, 2011 as receiver pursuant to section 243(1) of the BIA and section 101 of the *Courts of Justice Act* over all the assets, undertakings and properties acquired for or used in relation to a business carried on by Northern, including all proceeds thereof.

5 At the initial hearing, the Receiver was authorized and directed to conduct a sales process in respect of the Northern property. The Northern property was sold by way of a liquidation sale/auction in respect of personal property and an agreement of purchase and sale in respect of the real property. The Receiver has liquidated virtually all of the Northern property. The proceeds will not satisfy Northern's obligations to its secured creditors, who will suffer a shortfall. GE is the largest secured creditor.

6 The Northern assets are subject to two charges ranking ahead of the secured lenders, being a Receiver's charge and a tax liability to Thunder Bay in the amount of $157,864 undertaken to be paid in the sale of the realty. Northern has obligations to four secured lenders: GE, Royal Bank of Canada, Lucky Star Holdings Inc. and Buchanan Sales Inc.

Northern pension plans

7 Northern was the employer under, and the administrator of, two defined benefit pension plans:

i) a Retirement Plan for Employees of Northern (the "Hourly Plan"); and

ii) a Retirement Plan for Salaried Employees of Northern (the "Salaried Plan").

8 Unionized and non-unionized employees of Northern participated in the Hourly Plan prior to June 1, 2007. In February 2008, Northern filed amendments to the Hourly Plan with the Superintendent under the PBA seeking to cease participation of the non-unionized employees in the Hourly Plan effective June 1, 2007. Subsequently, on March 3, 2008, Northern filed documents with the Superintendent requesting the establishment of the Salaried Plan to be effective June 1, 2007.

9 In the fall of 2008, Northern idled its operations and virtually all of its employees were laid off.

10 In March 2010, the Superintendent issued notices of proposal giving notice that he intended to wind up the Hourly Plan and refuse to register the Salaried Plan.

11 On September 2, 2010, the Superintendent ordered that:

(a) the Hourly Plan be wound-up with a wind-up date of January 1, 2008; and

(b) the Salaried Plan's registration be revoked, which operated to terminate the Salaried Plan as of a date to be specified by the Superintendent. The Superintendent has not yet specified the date.

12 It would seem logical that the Superintendent could not revoke the registration of the Salaried Plan that had not been registered, but all counsel, including counsel for the Financial Services Commission of Ontario (FSCO), agreed that for the purposes of the PBA, revocation of a registered plan and a refusal to register a plan have the same effect.

13 The Receiver was appointed on January 4, 2011, several months after the Superintendent made his orders in relation to the Hourly and Salaried Plans. The January 4, 2011 order also approved the proposed Sale Process.

14 Morneau was appointed Administrator of the Hourly Plan on March 11, 2011 and Administrator of the Salaried Plan several months later on August 3, 2011.

Morneau recommendations

15 In March 2011, the Superintendent sought Morneau's submissions on: (a) whether there were contribution arrears for the Hourly Plan relating to periods before and after the wind up date for the Hourly Plan; and (b) what date should be used as the termination date of the Salaried Plan.

16 In response to the first question, on July 6, 2011 Morneau advised that if January 1, 2008, is the wind-up date, it had determined that there were no unpaid normal cost contributions with respect to the period prior to January 2008 for Hourly members. Morneau has since confirmed that there were no unpaid normal cost contributions for the period before January 2008 in relation to the Hourly Plan.

17 In response to the second question, Morneau did not answer the question directly but rather made the preliminary suggestion that FSCO should approve a transfer of the assets in the Salaried Plan to the Hourly Plan.

18 On November 7, 2011, Morneau's counsel wrote to the Receiver advising that Morneau intended to recommend to the Superintendent that the Hourly Plan and the Salaried Plan be treated as one plan and that the wind up date be November 16, 2010. Based on Morneau's initial calculations, if these two changes were made i.e., merging the Salaried Plan into the Hourly Plan and changing the wind up date for the Hourly Plan, normal cost arrears would be $335,777. Morneau also sought interest in the amount of $39,780 calculated to January 3, 2011, the day before the Receiver was appointed.

19 Morneau also alleged that sections 57(4) and 57(5) of the PBA established a deemed trust and lien over all of the Northern assets for any wind-up deficiency under both Plans. Morneau alleged that, if the Salaried Plan was merged into the Hourly Plan in accordance with its Recommendation, the wind-up deficiency would be more than $12 million.

20 On November 18, 2011, Morneau made submissions to the Insolvency Coordinator at FSCO, recommending that (1) the Superintendent issue a Notice of Intended Decision to revise the wind up date of the Hourly Plan from January 1, 2008 to November 16, 2010; and (2) the Salaried Plan be merged into the Hourly Plan.

21 On November 29, 2011, the Insolvency Coordinator at FSCO asked the Receiver and GE to make submissions on the Morneau Recommendation.

22 On September 6, 2012, both GE and the Receiver made submissions to the Superintendent regarding the Morneau recommendations. They noted that if the Superintendent was to issue an order changing the wind up date for the Hourly Plan,

such action could be a "proceeding" that was stayed by the receivership order. They also contended that the Superintendent had no jurisdiction under the PBA to change the wind up date for the Hourly Plan. The Superintendent has not taken any steps since GE and the Receiver made their submissions.

23 On October 22, 2012, the Receiver asked Morneau for additional information to assist in quantifying any unpaid normal cost if the status quo was maintained. On November 6, 2012, Morneau confirmed that there was no normal cost deficiency with respect to the Hourly Plan and advised that, assuming the Salaried Plan was given a termination date of November 16, 2010, there was a normal cost deficiency in the amount of $147,732, which included $12,117 in interest. The Receiver does not yet have sufficient information to confirm this number.

24 The amount of the claims asserted by Morneau on this motion depends in part on whether the wind up date for the Hourly Plan can be changed from January 1, 2008 to the date recommended by Morneau of November 16, 2010.

Issues

1. Stay of proceedings

25 The Receiver, supported by PwC, take the position that the stay contained in the initial receivership order prevents the attempt by Morneau to have the Superintendent change the wind up date for the Hourly Plan and that no leave should be given to lift the stay for that purpose. They do not take the position that the stay prevents the Superintendent from determining the wind up date of the Salaried Plan or from considering the merger of the Salaried Plan into the Hourly Plan.

26 Morneau takes the position that the stay does not cover what it is asking the Superintendent to do and that if it does, leave should be given to lift the stay for that purpose. The Superintendent supports the position of Morneau insofar as the "issues" before the Superintendent are not stayed. What those issues are is not spelled out in the factum of the Superintendent, i.e. whether what is properly before the Superintendent includes the recommendation of Morneau to change the wind up date for the Hourly Plan.

27 The stay of proceedings in the Receivership order is as follows:

> **NO PROCEEDINGS AGAINST THE RECEIVER**
>
> 7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.
>
> **NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY**
>
> 8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.
>
> **NO EXERCISE OF RIGHTS OR REMEDIES**
>
> 9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, ...

28 Paragraph 7 stays a proceeding in a court or tribunal. The regulatory process in question is not in a court or tribunal and thus paragraph 7 is not applicable.

29 Paragraph 8 stays a Proceeding against or in respect of Northern or its property, which includes the proceeds of that property. Morneau says that a Proceeding is only one in a court or tribunal because it is so defined in paragraph 7 of the order. Paragraph 9 stays any remedies "affecting" the property of Northern. The Receiver and PwC contend that changing the wind

up date of the Hourly Plan would affect the property, being the proceeds of the sale of Northern assets. Morneau contends that it would not affect the property, but only determine the claims against it.

30 I do not think that it can be said that Proceedings in paragraph 8 are limited to proceedings in a court or tribunal. It is the case that paragraph 7 states that a process in a court or tribunal is a Proceeding, but that paragraph does not define a Proceeding or purport to limit a Proceeding to a process in a court or tribunal. It merely states that a court or tribunal process is a Proceeding.

31 This reading of the stay provisions is supported by the decision in *Nortel Networks Corp., Re* (2010), 65 C.B.R. (5th) 231 (Ont. S.C.J. [Commercial List]); aff'd (2010), 67 C.B.R. (5th) 21 (Ont. C.A.). In that case a stay provision in an initial CCAA order containing the same language as the stay in this case was held by Morawetz J. to prevent warning notices given by the U.K. Pensions Regulator to various Nortel entities. The process by the U.K. regulator was not a court or tribunal process. Morawetz J. referred to authorities that broadly interpreted the word "proceedings" to cover both judicial and extra-judicial proceedings. His decision was upheld by the Court of Appeal.

32 Morneau refers to the recent legislative changes to the BIA and CCAA that prevent stays in proceedings under those statutes from affecting a regulatory body's investigations or a proceeding by or before a regulatory body. I am dealing however with a term of a court order that contains different language and cannot ignore that language.

33 In my view, the process whereby the Superintendent is being asked to change the wind up date for the Hourly Plan is stayed by paragraphs 8 and 9 the receivership order. The process sought by Morneau to be undertaken is a proceeding in respect of Northern or its property, and thus is caught by section 8 of the order. It is also a remedy affecting the property of Northern, and is thus caught by section 9 of the order.

34 In considering whether the stay should be lifted, a court is to consider the totality of the circumstances and the relative prejudice to both sides. See Houlden, Morawetz and Sarra, *The 2012-2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2012) at L5, p. 993. See also *General Motors Corp. v. Tiercon Industries Inc.* (Ont. S.C.J.) per Hoy. J. (as she then was). A court may order that a stay be lifted if satisfied that a party seeking leave is likely to be materially prejudiced by the stay or there are other equitable grounds on which to justify lifting the stay. See *Village Green Lifestyle Community Corp., Re* (2007), 27 C.B.R. (5th) 199 (Ont. S.C.J.) at para. 13 per Pepall J. (as she then was).

35 In considering an application for leave to lift a stay under the BIA, it has been held that there is no requirement to establish a *prima facie* case but an applicant must establish that there are sound reasons to relieve against the stay. See *Ma, Re* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.). I think the principle can safely be applied to a stay in a receivership order. However, in *Ma, Re*, it was stated that if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

36 I see no purpose in lifting the stay to permit consideration by the Superintendent to change the wind up date of the Hourly Plan. The Hourly Plan was wound up at the initiation of the Superintendent with a wind up date of January 1, 2008. This was a final order. It is conceded by counsel for the Superintendent that there is no authority in the PBA permitting the Superintendent to reconsider the wind up date of the Hourly Plan.

37 The position of the Receiver and GE is that the Superintendent is *functus officio* with respect to the wind up date of the Hourly Plan.

38 Morneau takes the position that with an administrative proceeding, a court has discretion to reopen the proceeding, and relies on *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.). I do not think the case is of assistance to Morneau. In that case, Sopinka J. for the majority stated the following:

> 21. To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in

> respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> 22. Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. (Underlining added)

39 Morneau and the Superintendent concede that there are no indications in the PBA that the decision of the Superintendent in question can be reopened. Thus the exception to the principle of *functus officio* enunciated by Sopinka J. has no application.

40 I also see substantial prejudice to GE if the stay were lifted. At the time the receivership action was commenced in January, 2011, the Hourly Plan had been wound up on the initiation of the Superintendent and the wind up date of January 1, 2008 was set by a final order. The Salaried Plan had been refused or revoked. In correspondence on February 9, 2011 and July 6, 2011 FSCO confirmed that the wind up date of the Hourly Plan was January 1, 2008. Sales proceedings had been initiated, approved by the Court and implemented by the Receiver, on notice to FSCO and Morneau. The sales and receivership proceedings were funded by GE and it and other stakeholders participating in the receivership proceedings incurred costs in pursuing their claims with expectations of recovery. Only in November 2011, some ten months after the initiation of the Receivership, did Morneau seek to implement a new wind up date and merge the Plans, the result of which if successful would be to alter existing priorities and negatively affect GE and other secured creditors of the Northern estate. By this time, the vast majority of the costs associated with this receivership had been incurred and paid out of the proceeds or directly by GE.

41 In these circumstances, I agree with the Receiver that given the fact that GE relied on the status quo in seeking to appoint the Receiver and the fact that Morneau raised and quantified its claims after the Receiver had incurred the majority of the expenses associated with the estate, it is not equitable to lift the stay and permit Morneau to seek priority over the secured creditors or to permit the Superintendent to revise his final order in a manner that increases Morneau's claim at the direct expense of the other secured creditors.

42 I would also note that even if there had been no stay, the proceedings sought to be initiated by Morneau would be futile as the Superintendent has no power to change the wind up date of the Hourly Plan. No attempt is made by the Receiver or GE to prevent the Superintendent from carrying out his obligation to set a wind-up date for the Salaried Plan or to consider merging the Salaried Plan into the Hourly Plan. Thus I see no prejudice to the Superintendent.

2. Section 81.6 BIA claim

43 Section 81.6 of the BIA grants a limited super-priority with respect to "normal costs" owed to a pension plan. Under section 81.6(2), claims for payment of normal costs rank ahead of the claims of secured creditors. Normal costs are defined in section 81.6(c)(i).

44 Morneau has confirmed that if the wind up date remains the same, then there are no unpaid normal costs in relation to the Hourly Plan. As I have held that the wind up date is to remain, no reserve is required for the Hourly Plan.

45 The Superintendent revoked the registration of the Salaried Plan by an order made under section 18(1)(b) of the PBA. That order operates to terminate the Salaried Plan as of a date specified by the Superintendent. The Superintendent has not yet specified a termination date for the Salaried Plan. Based on information provided by Morneau, it appears that the latest possible termination date is November 16, 2010 because that appears to be the last date of employment for an employee who participated in the Salaried Plan.

46 Morneau claims that there is a normal cost deficit of $147,732 including interest in the Salaried Plan using a termination date of November 16, 2010. The Receiver does not have sufficient information to confirm this figure. However the Receiver is agreeable to holding back this amount until the figure has been confirmed.

47 If the wind up date of the Hourly Plan were changed to November 16, 2010 and the Salaried Plan merged into the Hourly Plan with that changed wind up date, Morneau calculates the normal cost claim under section 81.6 of the PBA to be $383,646 inclusive of interest to November 19, 2012, and for the purposes of this motion asserts a priority claim in the amount of $383,646 plus interest to the date of payment. Counsel for the Receiver in argument said that if it was open to change the wind up date, the Receiver was prepared to hold back this amount of $383,646.

48 In view of the fact that the wind up date for the Hourly Plan cannot be changed, the amount of the holdback agreed to by the Receiver for the Salaried Plan of $147,732 is sufficient for the section 81.6 Salaried Plan claim. I assume it will be held in an interest bearing account so that if that amount is to be eventually paid, there will be interest on that money available.

49 During the argument on this motion, GE contended that because the Salaried Plan had never been registered by the Superintendent and because it had never been registered under the *Income Tax Act*, it was a retirement compensation arrangement as defined in section 248(2) of the *Income Tax Act* and therefore exempt by virtue of section 47(3) 5. of PBA regulation 909 from the application of the PBA. Therefore, GE contends, there can be no section 81.6 claim regarding the Salaried Plan and there should be no holdback by the Receiver.

50 This argument was not included in the GE factum and counsel for Morneau and for the Superintendent said they would want time to consider it before responding to it. In the circumstances, the order I make is that there should be a holdback of $147,732 as undertaken by the Receiver but if GE wishes to pursue the point, a motion can be brought by GE requesting that the holdback be terminated and Morneau and the Superintendent will then be able to deal with the point.

3. PBA deemed trust claim

51 Morneau alleges that special payment deficits as well as a wind-up deficit of $12,384,000 exists, assuming the Plans are merged, and claims this amount which is substantially more than the assets available for distribution. Morneau's calculation assumes that the Superintendent decides to follow Morneau's recommendations and merge the Salaried Plan into the Hourly Plan and change the wind up date for the Hourly Plan from January 1, 2008 to November 16, 2010. Even if the Superintendent is not permitted or chooses not to make the changes recommended by Morneau, as at January 1, 2008 the Hourly Plan would have had a wind-up deficit of more than $5 million, which is well in excess of the assets of Northern available for distribution.

52 In this case, the security granted to secured lenders took place in 2007 to 2009, well before the steps taken by the Superintendent to wind up the Hourly Plan and revoke the Salaried Plan. This is unlike the situation of the DIP lenders in *Indalex* in which their charge was created some two years after the salaried pension plan was terminated and the wind up date had been set. In *Indalex*, the executive pension plan was not wound up or a wind up date set until after the DIP charge had been created and thus the PBA deemed trust did not have first-in-time priority over the DIP charge. The situation in this case is akin to the executive plan in *Indalex*, and thus the Court of Appeal decision in *Indalex* is not authority that all Northern property is subject to a deemed trust. Unlike in *Indalex*, no constructive trust is claimed by Morneau over the Northern property.

53 The PPSA creates a limited exception to the first-in-time rule that would ordinarily apply to determining priority between a security interest and a subsequent PBA deemed trust. Section 30(7) of the PPSA 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*. (Underlining added)

54 Thus the beneficiaries of a PBA deemed trust have priority only over "an account or inventory and its proceeds". They are not granted priority over other property.

55 In this case, the value of Northern's assets that constitute "account or inventory and its proceeds" realized in the auction of Northern's non realty assets was $4,725.

56 In its factum Morneau stated that the deemed trust might apply to the amount in a GIC account that the Receiver was proposing to distribute to secured creditors. However, it appears clear from the definition of "account" in the PPSA that an account does not include a GIC.

57 During argument, counsel for Morneau said Morneau had no opposition to any balance over the section 81.6 claim being paid out by the Receiver to secured creditors subject to the deemed trust amount of $4,725. He conceded that Morneau has no evidence to say that the figure was wrong. On the evidence, it appears that the section 30(7) deemed trust claim in this case is limited to $4,725.

58 The Receiver and GE however take the position that the Receiver should not have to hold back this amount as the Receiver would be entitled under paragraph 3(r) of the receivership order to put Northern into bankruptcy and under the BIA, any PBA deemed trust would rank behind the secured creditors. If necessary the Receiver will take this step in order to protect the position of the secured creditors, but would prefer not to in order to avoid the extra expense of a bankruptcy, no doubt larger than $4,725. Counsel for Morneau in argument said that Morneau did not want to add to the costs by forcing a bankruptcy of Northern.

59 In the circumstances, the appropriate order is that the Receiver need not hold back any amount for a section 30(7) deemed trust claim.

4. Approval of the Receiver's Fifth Report and fees and disbursements

60 The Receiver seeks approval of its activities referred to in its Fifth Report and approval of its fees and disbursements and the fees and disbursements of its counsel. Morneau in its factum states that it has raised significant concerns in respect of the conduct of the Receiver and in the circumstances, it would not be appropriate to approve the Fifth Report or the conduct of the Receiver at this stage or to approve its fees and disbursements. Rather, such requests should be considered at a time when the regulatory process has been completed and the pension claims have been finally determined.

61 In October, 2011 GE, which had been funding the receivership costs, took the position that in light of Morneau's pension claims that would rank ahead of GE's security, GE would not pay any further costs of the receivership unless Morneau confirmed that it did not intend to assert priority over the receivership costs. Morneau took the position that it would not fund any receivership costs.

62 On October 27, 2011, Morneau confirmed to the Receiver in writing that Morneau would not assert a priority of the claims pursuant to the PBA or the BIA over the costs of the receivership proceedings, including amounts subject to the Receiver's Charge and the Receiver's Borrowings Charge. The letter stated that the confirmation represented a concession to achieve a commercial resolution in the circumstances that does not prejudice the position of any party with respect to the priority of the PBA Claims or the BIA Claims relative to other claims. One of its terms was that the Receiver would obtain court approval of its fees and disbursements and those of its counsel in accordance with the receivership order and that Morneau would have the right to oppose any request for approval.

63 Morneau takes the position that in raising the stay issue and seeking to distribute all the amounts the Receiver thinks is owing rather than protecting the pension claimants, the Receiver has not acted properly and has breached its fiduciary duties.

64 I do not agree with Morneau's assertions. The Receiver owed a duty as a court officer to take into account the interests of all stakeholders, including the secured creditors, and not just the pension claimants who would benefit from the pension claims asserted by Morneau. If the Receiver thought the claims of Morneau were not correct, it was entitled to raise that in its motion for directions, and even if the Receiver were not successful in the positions it took, that would not mean that it acted improperly.

65 In this case, the Receiver readily agreed to hold back the amount of the section 81.6 claim as determined by the Court, which depended on the issue of the change of the wind up date for the Hourly Plan. It objected to any other holdback for the pension claims asserted by Morneau as it took the position that there were no other legitimate claims. I see nothing improper in that that would require its fees to be reduced.

66 Morneau claims that the regulatory process in this case was developed by the Superintendent in consultation with the Receiver and that the Receiver should not have sat back with its position that the stay provisions of the receivership order prevented an attempt to change the wind up date for the Hourly Plan. I do not agree. First, everyone including the Superintendent was represented by counsel, and there is no reason why the Receiver was the person to advise interested parties what the stay provisions meant. More importantly, it was only in November, 2011 that Morneau took the position that the wind up date for the Hourly plan should be changed. Prior to that, the Superintendent had not suggested looking at any change. By the time that Morneau took its position on the claims in November, 2011, the bulk of the Receiver's fees and those of its counsel had been incurred. It was at that stage that Morneau agreed to subordinate any pension claims to the Receiver's past and future receivership cost. While the Receiver could have provided a more timely response, I would not see that as a basis for reducing its fees.

67 I have reviewed the Receiver's fees and disbursements and those of its counsel. They appear appropriate. No one has questioned the time spent or the hourly charges.

68 In the circumstances, the activities of the Receiver in its Fifth Report and in its Supplement to its Fifth Report are approved, as are its fees and disbursements and those of its counsel.

Conclusion

69 The Receiver may make distributions in accordance with the distribution schedule in paragraph 5 of its Supplement to its Fifth Report, which incorporates a holdback of $147,732 for the potential section 81.6 PBA claim. The cross-motion of Morneau is dismissed.

70 If any party claims costs, and they cannot be agreed, brief written submissions may be made within 10 days, along with a cost outline, and brief written reply submissions may be made within a further 10 days.

Order accordingly.

End of Document

TAB 4

2001 CarswellOnt 1019
Ontario Court of Appeal

Ma, Re

2001 CarswellOnt 1019, [2001] O.J. No. 1189, 104 A.C.W.S. (3d) 261, 143 O.A.C. 52, 24 C.B.R. (4th) 68

In the Matter of the Bankruptcy of James Hoi-Pang Ma, of the City of Mississauga, in the Regional Municipality of Peel, in the Province of Ontario

James Hoi-Pang Ma (Bankrupt (Appellant)) and Toronto Dominion Bank (Applicant (Respondent))

Abella, Charron, Sharpe JJ.A.

Judgment: March 23, 2001
Judgment: April 4, 2001 (Written Reasons)
Docket: CA C34958

Proceedings: affirming (2000), 20 C.B.R. (4th) 267 (Ont. Bktcy.); affirming (2000), 19 C.B.R. (4th) 117 (Ont. Bktcy.)

Counsel: *Chi-Kun Shi*, for Appellant
Bruce S. Batist, for Respondent
William J. Meyer, Q.C., for Trustee in Bankruptcy

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave

Creditor of undischarged bankrupt brought motion for order lifting stay of proceedings to permit creditor to commence and continue fraudulent misrepresentation action against bankrupt — Creditor's motion was granted — Deputy registrar held creditor's proposed action was type of claim that should be allowed to proceed — Deputy registrar held examination of merits of claim was not appropriate — Bankrupt's appeal was dismissed — Presence in proposed action of defendants other than bankrupt was sufficient prejudice to justify lifting stay — Bankrupt appealed — Appeal dismissed — Reviewing judge correctly concluded deputy registrar was correct in finding sufficient prejudice to creditor to justify lifting stay — No requirement existed to establish prima facie case — Onus was on creditor to establish basis for order lifting automatic stay under s. 69.4 of Bankruptcy and Insolvency Act — Deputy registrar's finding accorded with s. 69.4 of Act and was supported by record — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69.4.

Table of Authorities

Cases considered:

Arrojo Investments v. Cardamone (1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.) — referred to
Bowles v. Barber (1985), 36 Man. R. (2d) 209, 60 C.B.R. (N.S.) 311 (Man. C.A.) — not followed
Francisco, Re (1995), 19 C.L.R. (2d) 146, 32 C.B.R. (3d) 29 (Ont. Bktcy.) — applied
Francisco, Re (1996), 40 C.B.R. (3d) 77 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 69.4 [rep. & sub. 1997, c. 12, s. 65(1)] — considered

APPEAL by bankrupt from order lifting stay of proceedings against bankrupt, 2000 CarswellOnt 4416, 20 C.B.R. (4th) 267 (Ont. Bktcy.).

Endorsement. ***Per curiam*:**

1 The appellant argues that when considering an application to lift a stay under s. 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, the applicant is required to establish a *prima facie* case for the proposed action. *Bowles v. Barber* (1985), 60 C.B.R. (N.S.) 311 (Man. C.A.) is cited in support of this proposition. It is argued that to the extent Ontario cases such as *Arrojo Investments v. Cardamone* (1995), 33 C.B.R. (3d) 46 (Ont. Gen. Div.) apply a more lenient standard, they are inconsistent with decisions from other provinces.

2 In our view there is no requirement to establish a *prima facie* case and no inconsistency in the case law. We do not agree that *Bowles v. Barber* imposes a *prima facie* case requirement. More importantly, that requirement is not imposed by the statute. Under s. 69.4 the court may make a declaration lifting the automatic stay if it is satisfied (a) that the creditor is "likely to be materially prejudiced by [its] continued operation" or (b) "that it is equitable on other grounds to make such a declaration." The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 (Ont. Bktcy.), at 29-30, a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):

> In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, exist for relieving against the otherwise automatic stay of proceedings.

3 As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a *prima facie* case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

4 In the case before us, Justice Lane found that the Deputy Registrar was correct in finding that the applicant would suffer sufficient prejudice to justify an order lifting the stay. This finding accords with s. 69.4 and is supported by the record. We see no basis for interfering with his conclusion. The appeal is therefore dismissed with costs.

Appeal dismissed.

End of Document

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, RSO 1990, c C43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B3, as amended

ROYAL BANK OF CANADA
Applicant

-and-

DISTINCT INFRASTRUCTURE GROUP INC., et al
Respondents

Court File No. CV-19-00615270-00Cl

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE MOVING PARTIES
MEGA DIESEL HOLDINGS LTD.
AND CHRIS ARON WOOD
(Returnable December 17, 2019)

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