# TAB 4

Financial Services Commission of Ontario
Commission des services financiers de l'Ontario

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| SECTION: | Wind Up |
| INDEX NO.: | W100-102 |
| TITLE: | Filing Requirements and Procedure on Full or Partial Wind Up of a Pension Plan<br>- PBA ss. 52, 68, 70, 72-75, 77 and 81<br>- Regulation 909 ss. 15, 16, 28 and 29 |
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This policy replaces W100-101 ("Filing Requirements and Procedure") as of the effective date of this policy.

*Note: Where this policy conflicts with the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28 ("FSCO Act"), Pension Benefits Act, R.S.O. 1990, c. P.8 ("PBA") or Regulation 909, R.R.O. 1990 ("Regulation"), the FSCO Act, PBA or Regulation govern.*

**Pension Plan Wind Up - Filing Requirements and Procedure**

This policy identifies the filing requirements and procedure to be followed on the full or partial wind up of a pension plan. The considerations involved and the procedure followed for the partial wind up of a defined benefit pension plan are substantially similar to those applied to a full plan wind up. Unless specifically noted otherwise, use of the term "wind up" refers to both the full and the partial wind up of a pension plan.

The material which follows deals with key wind up requirements and procedure. Readers are reminded that the provisions of each pension plan are unique and the circumstances that trigger the wind up of a pension plan are various. Therefore, it is not possible to identify all issues that may be relevant to every plan situation in this policy. It should further be noted that the purpose of the administrative and actuarial guidelines set out in this policy is to assist administrators and their agents in the preparation of required wind up filings and FSCO staff in the review of the filings. These guidelines do not preclude the use of other bases if deemed appropriate in the circumstances. It is the responsibility of the administrators and/or their agents to demonstrate that the bases chosen are in compliance with the PBA and Regulation.

If administrators and their agents have questions about plan wind ups, they should refer to the relevant sections of the PBA and Regulation. Additional information may be obtained from other policies published by FSCO that deal with related wind up issues. Policies are intended to clarify how the PBA and Regulation are interpreted in certain situations and to assist administrators and their agents in understanding the requirements of the PBA, Regulation and FSCO's practices so that full compliance can be achieved.

**Plans Excluded**

This policy does not address multi-employer pension plans, defined benefit pension plans where the obligation of an employer to contribute is limited to a fixed amount set out in a collective agreement or situations involving a claim against the Pension Benefits Guarantee Fund ("PBGF"). Surplus matters are only briefly referenced in this policy, as other policies on this subject have been issued by FSCO.

*While every attempt has been made to be thorough, it is not possible to anticipate and address all wind up situations. Administrators, therefore, are reminded that the application of the PBA and Regulation is subject to the facts of each case. Accordingly, the contents of this policy should not be construed as legal, actuarial or professional advice. Independent professional advice should be obtained if there is a particular interest in any of the matters addressed in this policy.*

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*Administrators and consultants for pension plans that provide only defined contribution benefits need only reference sections I and IV (4.1 through 4.3 inclusive) and subsection 3.1 of this policy. Unless otherwise specified, this policy applies to partial plan wind ups as well as to full plan wind ups.*



## SECTION I Wind Up Process

For all pension plans, the wind up process consists of five stages. There is a sixth stage if a surplus remains after basic benefits have been distributed. For most stages, some specific action is required by either the administrator or the employer. Administrators should become familiar with this process in order to avoid delays which occur when a wind up report or other required filings do not comply with the PBA, Regulation and applicable FSCO policies.

### 1.1 An Overview of the Process

*Stage 1 - The employer decides to wind up a pension plan or the Superintendent of Financial Services ("Superintendent") so orders.*

The administrator is required to give notice of proposal to wind up the pension plan as identified under section 1.2 (Legislative Requirements and Current FSCO Practice) of this policy.

*Stage 2 - The administrator files a wind up report and other wind up documentation.*

The wind up report is a key document, which should include information about the funded status of the pension plan and the proposed methods of allocating and distributing assets.

FSCO staff review the submitted wind up documents. If the documentation is incomplete or deficient (e.g., documentation not certified or not signed), staff will write to the administrator or the administrator's agent to request the additional documents or information. Upon receipt and review of the additional documents or information, staff will make a recommendation to the Superintendent as to whether the wind up report complies with the requirements of the PBA and Regulation.

*Stage 3 - The administrator issues benefit statements.*

The administrator provides a statement setting out the benefits and options (including deemed election) available to each person entitled to a benefit or refund on the wind up of the plan. Depending on the situation, the administrator may decide to wait until after the Superintendent's approval of the wind up report to issue benefit statements (see also stage 4 described below).

*Stage 4 - The Superintendent approves the wind up report or approves only the payment of basic benefits.*

Where a wind up report complies with the requirements of the PBA and Regulation:

- if there is a surplus issue to be addressed, the Superintendent will approve only the payment of basic benefits until the disposition of the surplus has been determined. Once the disposition of surplus has been addressed in accordance with the PBA and Regulation, the Superintendent will approve the wind up report.

- if the pension plan has a funding deficit on a wind up date and the employer intends to fund the deficit in accordance with section 75 of the PBA, the Superintendent will approve the wind up report. However, the administrator is required to file annual reports as required by section 32 of the Regulation. In addition, until the Superintendent receives a report certifying that no further amounts are to be funded under section 75 of the PBA, the pension plan is prohibited under subsection 29(8) of the Regulation from using its assets to purchase single premium life annuities or paying out the commuted value of the pension benefits of any person affected by the wind up, except for the current value of any additional voluntary and/or required contributions made by the employee prior to the wind up date.

Where a wind up report does not comply with the requirements of the PBA and Regulation, the Superintendent will refuse to approve it.

*Stage 5 - The administrator distributes benefits.*

When the administrator receives the Superintendent's approval of the wind up report or approval of only the payment of basic benefits pursuant to subsection 70(3) of the PBA, the distribution of benefits can take place in accordance with the wind up report and the options elected, subject to any restrictions imposed by the Superintendent or prescribed by the PBA and Regulation.

*Stage 6 - The administrator distributes surplus.*

If a decision has been made to distribute all surplus available on wind up among plan members, former members or other eligible persons, the formula for distribution should be included in the wind up documentation.

If the employer intends to withdraw or share the surplus with the members, a surplus application is required to be made to the Superintendent. See policy S900-510 ("Application by Employer for Payment of Surplus on Full Wind Up of a Pension Plan") or policy S900-511 ("Application by Employer for Payment of Surplus on Partial Wind Up of a Pension Plan"), as appropriate, for information on the surplus application process.

### 1.1.1. Other Considerations

1) When a Notice of Proposal to Wind Up a Pension Plan Has Been Given

Subsection 70(2) of the PBA requires that once a notice of proposal to wind up a plan has been given, no payments or expenses can be paid out of the pension fund until the Superintendent has approved the wind up report. This restriction would not, however, interfere with the continuation of the payment of a pension or any other benefit if the payment began before the notice of proposal to wind up was issued. Also, the administrator or an agent of the administrator may request that the Superintendent authorize payment of other benefits or expenses pursuant to subsection 70(3) of the PBA prior to the approval of the wind up report.

2) Wind Up of Defined Benefit/Defined Contribution Hybrid Plans

On the wind up of a pension plan that provides benefits on both a defined benefit and defined contribution basis, the two parts are generally seen as separate. Once all contributions for the defined contribution part required up to the date of the wind up are received by the pension fund, the defined contribution part of the plan is fully funded. The defined benefit part would have a surplus or deficit, as the case may be, based on the assets and liabilities of the defined benefit part of the plan.

3) Split of Assets and Liabilities on Partial Wind Up

As at the effective date of a partial wind up, the liabilities and assets related to the members, former members and other persons affected by the partial wind up must be identified. The split of the pension plan assets between the wound up portion and the on-going portion of the plan must be determined as if the total pension plan were wound up on the partial wind up date. Section 2.5.2 of this policy describes how the asset split should be determined.

4) Approval of the Wind Up Report and Distribution of Assets

Once a wind up report is approved by the Superintendent, assets must be distributed in accordance with the wind up report, subject to the payment of any deficit in accordance with section 75 of the PBA. A pension plan wind up is not complete until all assets in the pension fund, or in the case of a partial wind up all assets related to the wound up portion of the pension fund, have been distributed in accordance with the wind up report approved by the Superintendent.

## 1.2 Legislative Requirements and Current FSCO Practice

### 1.2.1 Effective Date of Wind Up

Subsection 68(5) of the PBA provides that the effective date of wind up cannot be earlier than the date member contributions, if any, cease to be deducted, in the case of contributory pension plans, or in any other case, on the date the notice of wind up is given to members. Where a wind up results from a specific event such as plant closure, bankruptcy or purchase and sale, the effective date may not be earlier than the date of the specific event precipitating the wind up unless the requirements of subsection 68(5) of the PBA have been met prior to that date.

The Superintendent may change the effective date of wind up by order, if in the Superintendent's view there are reasonable grounds for such a change (subsection 68(6) of the PBA). The effective date of wind up may not be obvious in some circumstances, such as where there are a series of terminations of employment related to a downsizing. In such situations, the administrator or agent is encouraged to submit a written proposal supporting the selection of both the effective date of wind up and the time period during which the termination of a member will result in the member being included in the wind up. FSCO staff will consider the proposal in light of legislative requirements.

### 1.2.2 Notice of Proposal to Wind Up a Pension Plan

An employer who intends to wind up a pension plan in whole or in part must give notice of proposal, as required under subsections 68(2) and (3) of the PBA, to each of the following:

- the Superintendent;
- all members who are affected by the proposed wind up;
- all former members who are affected by the proposed wind up;
- any trade union(s) representing such members;
- the advisory committee (if any ); and
- any other person entitled to a payment from the pension fund who is affected by the proposed wind up.

The notice must contain the information prescribed in subsection 28(1)of the Regulation.

At a minimum, the administrator should provide FSCO staff with:

- a certified copy of the wind up notice;
- a statement outlining who (including any union, if applicable) received the notice; and
- the date the last notice was distributed.

In the event an employer declares bankruptcy, is placed in receivership or otherwise ceases operations, the administrator or the administrator's agent should notify FSCO staff immediately.

### 1.2.3 Persons Who Must be Included in the Wind Up

When a pension plan is being fully wound up, all members, former members and other persons entitled to payments from the plan on the effective date of wind up must be included in the wind up. In circumstances where a plan is partially wound up, only those members, former members and other persons affected by the partial plan wind up are included.

Where a wind up results from an event affecting the employment of the members, such as a plant closure, all members affected by the event who are participating in the plan on or after the date notice of the event is given must be included as members for the purposes of the wind up. This requirement applies even if a member terminates or is terminated after the notice date but prior to the event actually occurring.

If there has been a series of staggered layoffs prior to and/or after the wind up date, the administrator or the administrator's agent should submit a written proposal to identify which group of employees, including those who may have terminated prior to the wind up date and/or may terminate after the wind up date, will be entitled to be included in the wind up.

For more information relating to partial wind ups, please refer to policy W100-301 ("Notice of Proposal for Partial Wind Up").

### 1.2.4 Wind Up Documentation

In addition to the notice of proposal to wind up the plan, the following documentation must be filed.

Wind Up Report

Subsection 29(3) of the Regulation requires that, within six months following the effective date of the wind up, the administrator must file a wind up report pursuant to subsection 70(1) of the PBA. Pursuant to section 15 and subsection 29(1) of the Regulation, the report must be prepared by an actuary (i.e., a Fellow of the Canadian Institute of Actuaries), except with respect to the following plan types:

- a plan that provides only defined contribution benefits;
- a fully insured pension plan established prior to January 1, 1987, underwritten by a contract with an insurance company and that does not require employee contributions; or
- a pension plan underwritten by a contract issued under the *Government Annuities Act* (Canada).

The report required for these plan types may also be prepared by an accountant or a person authorized by an insurance company, a trust corporation or the Annuities Branch of the Government of Canada, responsible for administering the pension plan or pension fund.

Specific items to be included in a wind up report are set out under subsection 70(1) of the PBA. Section II of this policy provides further detail to assist actuaries in preparing wind up reports on pension plans that provide defined benefits.

Amendments, Resolutions and Form 1.1

Appropriate plan amendments and resolutions which affect the wind up should be filed in conjunction with the wind up report. The proposals in the wind up report must conform with the provisions of the plan and amendments.

If an amendment is required (e.g., where there are benefit improvements in conjunction with the wind up), an application for the registration of a plan amendment using FSCO pension Form 1.1 should be included with the wind up documentation. Form 1.1 is available on the FSCO website at www.fsco.gov.on.ca.

Superintendent's Checklist for Compliance on Plan Wind Up for Defined Benefit Plans

The administrator should file a completed Superintendent's Checklist for Compliance on Plan Wind Up for Defined Benefit Plans, which is available on the FSCO website at www.fsco.gov.on.ca. This checklist is designed to assist administrators and their agents in compiling the required submissions. It also aids FSCO staff in their review of the wind up. Poorly completed checklists may result in delay of the wind up process.

Wind Up Report for Defined Contribution Pension Plans

The administrator of a defined contribution pension plan that is to be wound up may wish to complete and file the Wind Up Report for Defined Contribution Pension Plans. This standardized report is available on the FSCO website at www.fsco.gov.on.ca. The report sets out the information required by FSCO staff and expedites the review of defined contribution plan wind ups.

Other Required Filings in Respect of a Full Wind Up

Pursuant to section 29.1 of the Regulation, the administrator must file the following documents within six months after the effective date of wind up for the period from the most recent plan year end to the effective date of wind up:

- an Annual Information Return ("AIR"), including the Pension Benefits Guarantee Fund Assessment Certificate
- financial statements for the pension plan or fund

The administrator is responsible for ensuring that all AIRs required up to the effective date of full wind up are filed and that all prescribed and outstanding fees and assessments are paid (subsection 29(4) of the Regulation).

### 1.2.5 Distribution of Benefits

The administrator is required, under section 72 of the PBA, to provide each person entitled to a benefit or refund from the plan on wind up with a statement setting out the person's benefits under the plan, the options available and other information as prescribed under subsection 28(2) of the Regulation. The statement should indicate, in accordance with clause 28(2)(t) of the Regulation, that the benefits and options are subject to the approval of the Superintendent and the Canada Revenue Agency, and may be subject to adjustment.

The statement containing the information prescribed under subsection 28(2) of the Regulation must be given to the specified persons within 60 days after the earlier of the administrator receiving notice that the Superintendent has approved the wind up report, or the payment of benefits under subsection 70(3) of the PBA.

A recipient of a statement issued in accordance with section 28 of the Regulation has 90 days after receipt of the statement to make an election and forward it to the administrator. If the recipient has an election to make and fails to do so within 90 days, that person shall be deemed to have elected to receive an immediate pension, if eligible. If the recipient is not eligible to receive an immediate pension, that person shall be deemed to have elected to receive a deferred pension commencing at the earliest date mentioned in clause 74(1)(b) of the PBA. Information pertaining to a deemed election should be specified in the statement in accordance with subsection 72(2) of the PBA and clause 28(2)(o) of the Regulation.

The administrator has 60 days to make payment in accordance with an election made (or deemed to have been made) by a person on wind up. The administrator must make payment within 60 days after the later of the day the administrator:

- receives the person's election (or if no election has been made, the day the person is deemed to have made the election), or
- receives notice that the wind up report has been approved by the Superintendent.

However, where the Superintendent approves the payment of benefits under subsection 70(3) of the PBA before approving the wind up report, the administrator must make payment in relation to an election resulting from such a statement within 60 days after the later of the day the administrator:

- receives the person's election (or if no election has been made, the day the person is deemed to have made the election), or
- receives notice of the Superintendent's approval to pay basic benefits under subsection 70(3) of the PBA.

If the plan has a deficit, payment of basic benefits described in statements given in accordance with section 28 of the Regulation are also subject to the requirements of subsections 29(7) and (8) of the Regulation and may be delayed due to these requirements.

### 1.2.6 Distribution of Surplus

Where there is surplus on the full or partial wind up of the plan, the administrator is also required to provide each person entitled to a benefit or refund from the plan on wind up with a statement setting out information and options respecting the distribution of the surplus as prescribed under subsection 28.1(2) of the Regulation. The statement must be given to the specified persons within 60 days after the administrator receives notice that the Superintendent has approved the wind up report.

A recipient of a statement issued in accordance with section 28.1 of the Regulation has 90 days after receipt of the statement to make an election (if the recipient has an election to make) and forward it to the administrator. If the recipient fails to make an election within 90 days, that person shall be deemed to have elected the method of distribution specified in the statement in accordance with subsection 28.1(4) of the Regulation.

The administrator must make payment within 60 days after the later of the day the administrator:

- receives the person's election (or if no election has been made, the day the person is deemed to have made the election), or
- receives notice that the wind up report has been approved by the Superintendent.

Depending on when the basic benefits are to be distributed relative to the distribution of surplus, it may be possible for the administrator to combine the statement requirements for the wind up and the surplus distribution in a single document.

### 1.2.7 Final Distribution of Assets and Confirmation of Distribution

Within 30 days after final distribution of the assets of the pension plan, or the assets of the wound up portion of the plan in the case of a partial wind up, the administrator must give the Superintendent written notice that all assets of the plan or the wound up portion of the plan have been distributed, as required under subsection 29.1(4) of the Regulation.

## SECTION II Preparing the Wind Up Report

A wind up report filed under subsection 70(1) of the PBA must comply with the prescribed requirements of the PBA and Regulation. As well, in preparing a wind up report for a defined benefit plan, subsection 16(1) of the Regulation requires that an actuary ".....shall use methods and actuarial assumptions that are consistent with accepted actuarial practice and with the requirements of the Act and this Regulation." As at the date of publication of this policy, applicable professional standards are set out in the document titled *Consolidated Standards of Practice - Practice-Specific Standards for Pension Plans* issued in May 2002 by the Canadian Institute of Actuaries (the "CIA Standards").

Under subsection 70(1) of the PBA, the wind up report must set out at least the following:

- the assets and liabilities of the pension plan;
- the benefits to be provided under the pension plan to members, former members and other persons;
- the methods of allocating and distributing the assets (including any surplus) of the pension plan and determining the priorities for payment of benefits; and
- such other information as is prescribed.

### 2.1 Compliance Items

Where an actuary is required to prepare a wind up report, the actuary should confirm compliance with respect to the following legislative requirements, where applicable:

- Minimum value of employee contributions with interest for pre-1987 benefits ..... PBA ss. 39(1) & (2)
- Minimum 50% cost rule for post-1986 contributions ..... PBA ss. 39(3) & (4)
- Early retirement options ..... PBA s. 41
- Joint and 60% survivor option ..... PBA s. 44
- Full vesting ..... PBA s. 73(1)(b)
- Grow in rights ..... PBA s. 74
- Notice period under *Employment Standards Act, 2000* ..... PBA s. 74(5)
- Deemed consent of ancillary benefits ..... PBA s. 74(7)
- Benefits accrued under all prior plans included in the report ..... PBA s. 81(2)
- Minimum credited interest from date of wind up to date of payment ..... Regulation s. 24(12)
- Minimum commuted value of a pension, deferred pension or ancillary benefit ..... Regulation s. 29(2)

## 2.2 Membership Data

Among the CIA Standards, the following requirements are included:

"3600.05 The report should be detailed enough to enable another actuary to examine the reasonableness of the valuation."

"3720.16 The data are the responsibility of the plan administrator. The actuary would, however, report on the sufficiency and reliability of the data, including specifically the capitalized values included in the valuation whether or not the plan administrator was the calculator thereof."

"3720.17 The finality of wind-up calls for the actuary to obtain precise data." [The balance of the paragraph goes on to address the situation where precise data on membership is not available.]

"3720.18 The reported membership data would include details of the amount and terms of payment of each member's benefits."

The following information is required by FSCO staff in order to complete their review of a wind up report. Such information should be provided in an anonymous form (i.e., no names, social insurance numbers or other personal identifiers should be provided).

For members and deferred vested former members:

- age or date of birth
- sex
- years of continuous service, or date of hire (members only)
- years of credited service (pre-1987 and post-1986; members only)
- years of membership, or date of plan entry (members only)
- date of termination (if different than the effective date of wind up)
- accumulated (pre-1987 and post-1986) employee contributions with interest, if any
- salary upon which the benefits are based (members only), if applicable
- accrued (pre-1987 and post-1986) pension
- bridging benefit (pre-1987 and post-1986), if any
- any other benefits provided under the plan
- commuted values of accrued (pre-1987 and post-1986) pension, bridging (pre-1987 and post-1986) and other benefits
- excess contributions due to 50% cost rule
- additional voluntary contributions with interest, if any

For former members in receipt of pension payments and other beneficiaries:

- age or date of birth
- spousal age or spousal date of birth
- sex
- date of retirement
- amount of pension payable
- bridging benefit, if any
- any other benefits provided under the plan
- form of pension payment
- wind up liabilities or commuted values of pension, bridging and other benefits

The report should include a reconciliation of plan membership from the valuation date of the last filed actuarial report to the effective date of the wind up.

In the case of a partial wind up, a summary of the statistics pertaining to members who are remaining in the on-going portion of the plan should also be provided. However, if there have not been significant changes in membership since the valuation date of the last filed actuarial report, a reference to that report with respect to the remaining members is acceptable.

### 2.3 Plan Provisions

The report must include a summary of plan provisions that were reflected in the wind up valuation. The actuary should ensure that the summary is consistent with the plan documents filed with FSCO.

### 2.4 Commuted Values of Benefit Entitlements

Appendix A sets out the actuarial guidelines that are currently followed by FSCO staff in their review of the determination of the commuted values of members' benefit entitlements on wind up. These guidelines do not preclude the use of any other actuarial basis if deemed appropriate by the actuary. However, the actuary should justify the basis used and demonstrate that the commuted values calculated using such a basis would comply with the Act and Regulation.

### 2.5 Financial Position of the Plan on Wind Up

In addition to the determination of the commuted values of the benefit entitlements of the individual members, the wind up report must provide information on the financial position of the pension plan as a result of the wind up. Determination and reporting of the financial position of a defined benefit pension plan must comply with the CIA Standards.

#### 2.5.1 Valuation Balance Sheet in Respect of a Full Wind Up

In the case of a full wind up, the wind up report should provide a valuation balance sheet including the assets and the wind up liability of the plan as of the effective date of wind up.

Assets

Assets should be valued at market, with adjustments for receivables or payables at the effective date of wind up. The actuary should describe in detail any estimates that were made of market values. In particular, if the actuary has reason to believe that there may be items which might adversely affect the quality of assets, the actuary should disclose this information and quantify the impact, to the extent possible. In making this determination, the actuary may rely on or use the opinion of another person if such reliance or use is justified in the circumstances. Cash out value should be used for insurance company guaranteed annuity contracts and general fund deposit administration contracts.

If expenses are expected to be paid from the fund and the payment of these expenses is permitted under the plan, a reasonable allowance for wind up expenses should be identified and deducted from the value of plan assets. In determining the wind up funded ratio of the plan, this net asset value is taken as the numerator in the funded ratio formula.

The report should include a reconciliation of plan assets from the valuation date of the last filed actuarial report.

Wind Up Liability

The wind up liability must reflect all benefits provided under the plan and the applicable legislation on wind up and should be separately summarized for each major category of membership. For members and former members who are expected to receive a commuted value, the wind up liability must be consistent with the individual commuted values of the benefit entitlements determined in accordance with subsection 29(2) of the Regulation. For members and former members who are receiving or are expected to receive a pension benefit, the wind up liability should reflect the estimated cost of purchasing the pension benefits. The assumptions should indicate the percentage or category of members/former members for whom benefits will be settled by annuity purchase.

### 2.5.2 Valuation Balance Sheet in Respect of a Partial Wind Up

The partial wind up report should provide a valuation balance sheet in respect of each of the wound up and on-going portions of the plan as of the effective date of wind up.

Where a plan covers only members with Ontario employment, FSCO staff will accept, as a matter of practice, the splitting of assets between the wound up portion and the on-going portion of the plan in proportion to the wind up liabilities as of the effective date of wind up (the "standard method"). Splitting of assets on another method may also be accepted if the actuary can confirm that, in his or her opinion, such a split would not result in an asset allocation that is materially different than that under the standard method. If the actuary uses a method other than the standard method, comments supporting the appropriateness of the method used should be included in the report.

For the on-going portion of the plan, the actuary should confirm whether the funding requirements as set out in the last filed funding actuarial report would continue to apply or otherwise set out the new funding requirements in a separate actuarial cost certificate or funding actuarial report.

### 2.6 Actuary's Statements of Opinion

The actuary must provide statements of opinion in accordance with the CIA Standards.

## SECTION III Treatment of Surplus/Deficit

The term "wind up" is defined in the PBA to mean the termination of a pension plan and the distribution of the assets of the pension fund. Therefore, in addition to establishing the benefits to be provided to affected members and former members, the wind up report should identify any excess or shortfall of assets existing after satisfying the liabilities (i.e., the surplus or deficit).

### 3.1 Surplus

If the pension plan is in a surplus position on full wind up, or the wound up portion of the pension plan is in a surplus position on partial wind up, the administrator should indicate how the surplus assets will be dealt with. Distribution of the assets must conform with the proposals set out in the wind up report approved by the Superintendent. If the wind up report does not indicate how the surplus will be dealt with, a supplement to the wind up report dealing with the surplus assets will be required.

### 3.2 Deficit

If the wind up report reveals that the plan does not have sufficient assets to pay the liabilities on wind up, the employer must pay into the pension fund amounts required under section 75 of the PBA.

The amount of deficit to be funded pursuant to clause 75(1)(b) of the PBA is the amount by which the Ontario wind up liability, exclusive of the unfunded portion of non-plan-vested benefits, exceeds the value of plan assets allocated for payment of pension benefits accrued with respect to employment in Ontario. Pursuant to clause 29(9)(a)of the Regulation, where payments are being made in accordance with section 75 of the PBA, the employer is not liable to pay the unfunded portion (based on the wind up funded ratio) of non-plan-vested benefits.

Where the employer funds the deficit by a lump sum payment and the actuary files a certification that the obligations under section 75 of the PBA have been fully funded, the benefits can be paid. As a minimum, the deficit must be funded in accordance with section 31 of the Regulation by annual special payments, payable annually in advance, over a maximum period of five years commencing at the effective date of wind up (for qualifying plans, by monthly special payments over one year).

The administrator is required under section 32 of the Regulation to file a report annually until the employer's obligation

under section 75 of the PBA has been fulfilled. This annual report must be prepared by an actuary and must satisfy all standards normally applicable to a valuation report. In addition, the report should provide a gain and loss analysis since the last report filed and specify the special payments required to liquidate the remaining liability obligation under section 75 of the PBA. Where a report shows that no further amount is to be funded, subsection 32(4) of the Regulation provides that any surplus may revert to the employer, subject to the requirements of section 79 of the PBA.

Subsections 29(7) and (8) of the Regulation set out the restrictions on cash out, transfers and annuity purchases prior to the plan being fully funded. For more information, see policy W100-440 ("Restrictions on Payments in Deficit Situations").

## SECTION IV Specific Issues Related to Wind Up

In this Section, a few specific issues related to wind ups are discussed, along with current FSCO practice with respect to these issues.

### 4.1 Payments Approved by the Superintendent

Prior to FSCO's review of a wind up report, the Superintendent may approve, under subsection 70(3) of the PBA, various kinds of payments, including the payment of expenses, commencement of monthly pension payments to retirees under a defined benefit plan and purchase of immediate annuities for eligible retirees under a defined contribution plan. Death benefits will also generally be approved if FSCO staff are satisfied that the plan would be fully funded.

The administrator may obtain approval from the Superintendent for a payment of expenses out of the plan fund. However, the administrator must ensure that such payment would not contravene section 22 of the PBA. See also policy A200-801 ("Costs for Wind Up and Surplus Applications").

Approvals under subsection 70(3) of the PBA will also be given by the Superintendent for payment of all benefit entitlements once FSCO staff have reviewed the wind up report and are satisfied that all benefits have been provided for properly. However, an outstanding issue related to surplus may remain: either the administrator has not determined how the surplus is to be dealt with or there is a pending surplus refund proposal that requires the Superintendent's consent.

Once the wind up report is approved, all payments must be made in accordance with it.

### 4.2 Prior Plans

Prior pension plans sponsored by the same employer are deemed to be benefits associated with the current plan whether or not the assets were consolidated as set out under subsection 81(3) of the PBA. To the extent these apply to members affected by the wind up, such prior plans must also be included for the purposes of the wind up.

### 4.3 Notice of Termination of Employment

Pursuant to subsections 74(5) and (6) of the PBA, membership in a non-contributory plan should include the period of notice of termination of employment required under the *Employment Standards Act, 2000*. The notice period is included for both benefit eligibility and benefit calculation purposes. For contributory plans the members must be given the option to make the required contributions in respect of the notice period in order to have the period included for benefit purposes.

### 4.4 Grow In Under Section 74 of the PBA

In accordance with subsection 74(1) of the PBA, a member whose age plus service or plan membership equals 55 or more at the effective date of wind up (the "rule of 55") will be eligible to receive:

(a) an immediate pension, if eligible under the plan;

(b) a pension beginning at the earlier of the normal retirement date under the plan, or the date on which the member would be entitled to an unreduced pension under the plan had the plan not been wound up and had the member's membership continued to that date;

(c) a reduced pension in the amount payable under the plan beginning on the date on which the member would be entitled to the reduced pension under the plan as if the pension plan were not wound up and the member's membership had continued to that date.

The benefit entitlements for the "rule of 55" members must reflect this grow in provision.

Furthermore, pursuant to subsection 74(3) of the PBA, if a "rule of 55" member has at least 10 years of continuous service or membership at the date of wind up, the bridging benefits to which the member would have been entitled if the plan were not wound up and if the member's membership continued, subject to proration under subsection 74(4) of the PBA, must be reflected in the member's benefit entitlements.

### 4.5 Treatment of Special Benefits

Certain special benefits require specific treatment on wind up. In addition, grow in to these benefits should be provided in accordance with section 74 of the PBA, where applicable. The treatment of these special benefits is outlined below:

- **Consent benefits** must be provided on a plan wind up as required under subsection 74(7) of the PBA.
- **Escalated adjustments or indexation** (including adjustments that have not been made) are not considered to be ancillary benefits. They are part of the pension benefit under the plan, and thus must be included in the wind up benefits.
- **Early retirement window benefits** should be included to the extent that a member would have become eligible for the benefits prior to the close of the window, had the plan not been wound up and the member's membership continued.
- **Plant closure benefits and permanent layoff benefits** should be included for wind up purposes where the wind up is in conjunction with or accompanied by one of these events.
- **Prospective benefit increases** are not required to be included on plan wind up.

### 4.6 Allocation of Assets for Multi-jurisdictional Plans

In the case of a wind up covering members in more than one jurisdiction in which there are insufficient assets to cover all liabilities, the method for allocating assets among the various jurisdictions is prescribed in section 30 of the Regulation. The assets allocated to another jurisdiction should be dealt with in accordance with the requirements of that jurisdiction.

## APPENDIX A Specific Guidelines on Actuarial Assumptions and Methods for the Calculation of the Commuted Value of Individual Benefit Entitlements on Plan Wind Up

In their review of the commuted value calculations, FSCO staff use the following actuarial guidelines developed from the *Recommendations for the Computation of Transfer Values from Registered Pension Plans* issued by the Canadian Institute of Actuaries effective September 1, 1993 (the "CIA Recommendations") that are currently prescribed in subsection 29(2) of the Regulation. These guidelines will remain in effect until subsection 29(2) of the Regulation is amended to refer to any other basis.

### A.1.1 Interest

For non-indexed pensions and fully indexed pensions, the assumed interest rates should not be higher than the respective rates determined in accordance with the CIA Recommendations.

Partially indexed pensions should be valued using the method prescribed in the CIA Recommendations.

### A.1.2 Mortality

The mortality assumption should not be weaker than the *1983 Group Annuity Mortality Table* (GAM83) (including a level 10 per cent margin) as published on pages 880 and 881 of Volume XXXV of the *Transactions of the Society of Actuaries*.

Pre-retirement Death Benefits

If the only pre-retirement death benefit is the commuted value of the member's pension, it is appropriate to assume no mortality before retirement. Otherwise, a full description of how the pre-retirement death benefit, if any, is valued should be provided.

Unisex Table

In compliance with section 52 of the PBA, a unisex mortality table must be used to determine the commuted values of post-1986 benefits. The report should state clearly the mix of the male and female rates, and indicate the basis from which the mix is derived (for example, relative to the number of members or liabilities).

As a matter of practice, FSCO staff will also accept the use of unisex rates for pre-1987 benefits.

### A.1.3 Retirement Age

The report should explicitly state the retirement age assumption for each category of membership. FSCO staff will not accept statements which simply state that there has been compliance with section 74 of the PBA.

Reference should be made to section 4.4 of this policy (Grow In Under Section 74 of the PBA). For the purpose of section 74 of the PBA, members meeting the "rule of 55"should be assumed to retire at the most favourable retirement age (i.e., the retirement age that produces the highest commuted value).

To be consistent with the CIA Recommendations, if a plan provides that a deferred vested former member has the right to elect an earlier commencement date with a subsidized early retirement pension (i.e., a pension that exceeds the amount which is of actuarial equivalent value to the pension payable at normal retirement age), then the assumed retirement age should reflect the full value of the subsidy for all members and deferred vested former members, and not just the "rule of 55" members.

### A.1.4 Marital Status

The marital status assumptions should be determined in accordance with subsection 3(A) (Demographic Assumptions) of the CIA Recommendations.

### A.1.5 Date of Computation

Individual commuted values of benefit entitlements normally should be calculated as of the effective date of wind up using a basis in effect on that date. If warranted by the wind up circumstances, other computation date(s) may be used.

# TAB 5

20 C.B.R. (3d) 257, 48 C.C.E.L. 58, (sub nom. Abraham v. Coopers & Lybrand Ltd.) 13 O.R. (3d) 649, C.E.B. & P.G.R. 8147

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Abraham v. Canadian Admiral Corp. (Receiver of)
GARRY B. ABRAHAM, et al. v. COOPERS & LYBRAND LIMITED (receiver and manager for CANADIAN ADMIRAL CORPORATION LTD.) and NATIONAL BANK OF CANADA
Ontario Court of Justice (General Division)
Wilson J.
Heard: January 18-22, 25, May 18 and June 2, 1993
Judgment: June 22, 1993
Docket: Doc. 20117/87



Counsel: Ian G. Scott and Martin J. Doane, for plaintiffs.

Joseph W. Mik and J. Alan Aucoin, for defendants.

Hart Schwartz, for intervenor, Attorney General of Ontario.

Subject: Corporate and Commercial; Insolvency; Labour and Employment; Property; Civil Practice and Procedure; Contracts

Banking and Banks --- Loans and discounts -- Loans under s. 178 of Bank Act (R.S.C. 1985, c. B-1, formerly s. 88, R.S.C. 1970, c. B-1) -- General.

Bankruptcy --- Property of bankrupt.

Limitation of Actions --- Actions in contract or debt -- Actions upon specialties -- General.

Secured creditors -- Priorities -- Subsequent bankruptcy of company having no effect upon priorities established when rights under Bank Act crystallized -- Property subject to Bank Act security not being property of bankrupt within meaning of s. 47 of Bankruptcy Act -- Bank Act, being Pt. I of s. 2 of Banks and Banking Law Revision Act, 1980, S.C. 1980-81-82-83, c. 40 -- Bankruptcy Act, R.S.C. 1985, c. B-3, s. 47.

Limitation of actions -- Employees bringing claim for vacation pay and pension benefits almost six years after employment terminated -- Action not subject to two-year limitation period -- Action being "action upon a specialty" subject to 20-year limitation period in s. 45(1)(b) of Limitations Act -- Limitations Act, R.S.O. 1980, c. 240, s. 45(1)(b).

Estoppel -- Employees pursuing claims as preferred creditors in bankruptcy proceedings -- Employees later pursuing claims as secured creditors -- Employees not estopped from bringing second claims as no previous actions

constituting unconditional, unequivocal, irrevocable surrender of security.

After the debtor company defaulted under a security agreement in 1981, agents for the bank took possession of the debtor company's assets and immediately began realizing upon the assets. The company ceased carrying on business and the employees were terminated. Shortly thereafter, the company was petitioned into bankruptcy by other creditors. The agents for the bank realized $45 million upon the assets. A shortfall of $11 million plus interest remained owing to the bank.

In 1987, the employees brought an action seeking compensation for vacation pay and pension benefits accrued and not paid prior to the closing of the company. They based their claims on the provincial statutory trusts and liens found within the provisions of the Pension Benefits Act (Ont.) and the Employment Standards Act (Ont.). The bank relied on its s. 178 Bank Act security to establish its priority.

The bank argued that the employees' claim was barred by the two-year limitation period provided for in s. 45(1)(h) of the Limitations Act (Ont.). The employees argued that s. 45(1)(h) did not apply to the case and that theirs was an action upon a specialty; therefore, the 20-year limitation period in s. 45(1)(b) applied.

The bank also argued that as the employees had pursued their rights as preferred creditors in the bankruptcy proceedings in 1981, they were estopped from also claiming under the provincial legislation.

Held:

The action was allowed.

A statutory obligation creating or recognizing a debt is a specialty and a debt "on a statute" with a 20-year limitation. As a result, the employees' action was not statute-barred.

In order to estop a creditor from advancing a claim as a secured creditor, the actions of the creditor must amount to an unequivocal, unconditional and irrevocable surrender of the security. The filing of a proof of claim as an unsecured creditor is not an irrevocable or unconditional act. Therefore, the employees were not precluded from claiming as secured creditors in this action.

The deemed trust provisions and statutory liens provided for in s. 15 of the Employment Standards Act and s. 23 of the Pension Benefits Act were valid, enforceable provincial liens having priority to the bank's s. 178 security. Each day as the employees worked for the bankrupt company, the statutory trusts arose and liens attached to the assets of the bankrupt company. Therefore, the bankrupt company's rights were subject to the trust and lien claims of the employees. The Bank Act security gave no higher rights of ownership that those possessed by the bankrupt company as owner.

The bankruptcy of the company had no effect upon the priorities determined on the day in 1981 when the bank took possession and the company ceased carrying on business. On that day, rights under the Bank Act crystallized. The property subject to the Bank Act security was not property of the bankrupt within the meaning of s. 47 of the Bankruptcy Act.

Cases considered:

Andrew v. FarmStart (1988), 71 C.B.R. (N.S.) 124, 71 Sask. R. 146, [1989] 2 W.W.R. 127, 54 D.L.R. (4th) 406 (C.A.), leave to appeal to S.C.C. refused 73 C.B.R. (N.S.) xxvii (note), [1989] 4 W.W.R. lxx (note), 57 D.L.R. (4th) viii (note), 102 N.R. 158 (note) -- referred to

Armstrong v. Canadian Admiral Corp. (Receiver of) (1986), 58 C.B.R. (N.S.) 209, 5 P.P.S.A.C. 296, 86 C.L.L.C. 14,016, (sub nom. Armstrong v. Coopers & Lybrand Ltd.) 53 O.R. (2d) 468, 24 D.L.R. (4th) 516 (S.C.), affirmed (1987), 65 C.B.R. (N.S.) 258, 61 O.R. (2d) 129, 8 P.P.S.A.C. 7, 42 D.L.R. (4th) 189, 88 C.L.L.C. 14,014 (C.A.), leave to appeal to S.C.C. refused (sub nom. National Bank of Can. v. Armstrong) (1988), 87 N.R. 398 (note) -- followed

Bank of Montreal v. Canada Packers Inc. (1986), 55 O.R. (2d) 332 (Dist. Ct.), affirmed (1987), 61 O.R. (2d) 725 (Div. Ct.) -- referred to

Bank of Montreal v. Guaranty Silk Dyeing & Finishing Co., 16 C.B.R. 363, [1935] O.R. 493, [1935] 4 D.L.R. 483 (C.A.) -- referred to

Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, 9 P.P.S.A.C. 177, [1990] 2 W.W.R. 193, 104 N.R. 110, 65 D.L.R. (4th) 361, 46 B.L.R. 161, 82 Sask. R. 120 -- considered

Bank of Nova Scotia v. International Harvester Credit Corp. (1990), 3 C.B.R. (3d) 113, 74 O.R. (2d) 738, 73 D.L.R. (4th) 385, 40 O.A.C. 321, 1 P.P.S.A.C. (2d) 93 (C.A.) -- considered

Becker v. Pettkus, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384 -- referred to

Bott v. Mel-City Electric Ltd. (1987), 64 Sask. R. 219 (C.A.) -- referred to

British Columbia v. Federal Business Development Bank (1987), 65 C.B.R. (N.S.) 201, 17 B.C.L.R. (2d) 273, [1988] 1 W.W.R. 1, 43 D.L.R. (4th) 188 (C.A.) -- referred to

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, 75 C.B.R. (N.S.) 1, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164 -- distinguished

Cadillac Explorations Ltd. v. Kilborn Engineering Ltd. (1983), 51 C.B.R. (N.S.) 315, 51 B.C.L.R. 221 (C.A.) -- applied

Canadian Bank of Commerce v. Turcotte, [1957] Que. Q.B. 127 (C.A.) -- referred to

Canadian Exotic Cattle Breeders' Co-operative, Re (1979), 31 C.B.R. (N.S.) 217, 14 B.C.L.R. 183, 103 D.L.R. (3d) 112 (S.C.) -- applied

Carlyle v. Oxford (County) (1914), 30 O.L.R. 413, 18 D.L.R. 759 (C.A.) -- considered

Dairy Maid Chocolates Ltd., Re (1972) 17 C.B.R. (N.S.) 270, [1973] 1 O.R. 603, 31 D.L.R. (3d) 699 (S.C.) -- referred to

Debor Contracting Ltd. v. Core Rentals Ltd. (1982), 44 C.B.R. (N.S.) 9, 40 O.R. (2d) 24 (H.C.) -- considered

Deloitte Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) , [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, [1985] 4 W.W.R. 481, 38 Alta. L.R. (2d) 169, 60 N.R. 81, 19 D.L.R. (4th) 577, 63 A.R. 321 -- followed

Demont v. Cornwallis Realties Ltd. (1989), 32 C.L.R. 177, 89 N.S.R. (2d) 108, 227 A.P.R. 108, 57 D.L.R. (4th) 147 (C.A) -- considered

Evelyn Stevens Interiors Ltd., Re (1993), 18 C.B.R. (3d) 22, 46 C.C.E.L. 136, (sub nom. Ontario (Workers' Compensation Board) v. Mandelbaum, Spergel Inc.)) 12 O.R. (3d) 385, (sub nom. Ontario (Workers' Compensation Board) v. Evelyn Stevens Interiors Ltd. (Trustee of))) 100 D.L.R. (4th) 742, (sub nom. Stevens (Evelyn) Interiors Ltd. (Bankrupt) v. Ontario (Workers' Compensation Board)) 61 O.A.C. 361 (C.A.) -- applied

Federal Business Development Bank v. Active Enterprises Ltd. (1979), 34 C.B.R. (N.S.) 61, 109 D.L.R. (3d) 351 (Sask. Q.B.) -- referred to

Gray v. Canada (Attorney General) (1977), [1978] 1 F.C. 808, 18 N.R. 393 (C.A.) -- referred to

Greenwood Shopping Plaza Ltd. v. Beattie, [1980] 2 S.C.R. 228, 10 B.L.R. 234, 111 D.L.R. (3d) 257, 39 N.S.R. (2d) 119, 71 A.P.R. 119, [1980] I.L.R. 1- 1243, 32 N.R. 163 -- referred to

I.B.L. Industries Ltd., Re (1991), 4 C.B.R. (3d) 301, 76 D.L.R. (4th) 439, 2 O.R. (3d) 140 (Bktcy.) -- applied

Inco Ltd. v. United Steelworkers of America (1984), 6 C.C.E.L. 263 (Ont. Div. Ct.) -- referred to

Kenroc Building Materials (1978) Ltd. v. Regina (City) (1982), 138 D.L.R. (3d) 189 (Sask. C.A.) -- referred to

London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299, 43 C.C.E.L. 1, [1993] 1 W.W.R. 1, 13 C.C.L.T. (2d) 1, 73 B.C.L.R. (2d) 1, 97 D.L.R. (4th) 261, (sub nom. London Drugs Ltd. v. Brassart) 143 N.R. 1, 18 B.C.A.C. 1, 31 W.A.C. 1 -- distinguished

Mercantile Bank of Canada v. Leon's Furniture Ltd. (1992), 18 C.B.R. (3d) 72, 98 D.L.R. (4th) 449, 11 O.R. (3d) 713, 62 O.A.C. 187 (C.A.) -- referred to

Mills-Hughes v. Raynor (1988), 68 C.B.R. (N.S.) 179, 19 C.C.E.L. 6, 25 O.A.C. 248, 38 B.L.R. 211, 63 O.R. (2d) 343, 47 D.L.R. (4th) 381 (C.A.) [additional reasons at (1988), 47 D.L.R. (4th) 381 at 388, 63 O.R. (2d) 730 (C.A.)] -- considered

Mount James Mines (Quebec) Ltd., Re (1980), 33 C.B.R. (N.S.) 227, 28 O.R. (2d) 271, 110 D.L.R. (3d) 80 (S.C.) -- applied

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 -- followed

NEC Corp. v. Steintron International Electronics Ltd. (February 4, 1986), Doc. Vancouver C853762, Finch J. (B.C. S.C.) , [1986] B.C.W.L.D. 935 -- referred to

Noren v. Tarsands Machine & Welding Co. (1975) (1982), 20 Alta. L.R. (2d) 242, 24 R.P.R. 290, 138 D.L.R. (3d) 335, 45 A.R. 223 (Q.B.) -- considered

Northland Fisheries Ltd. v. W.A. Scott & Sons Ltd., [1975] 5 W.W.R. 183, 56 D.L.R. (3d) 319 (Man. Q.B.) -- referred to

Ontario (Teachers' Pension Plan Board) v. York University (1990), 72 D.L.R. (4th) 253, 74 O.R. (2d) 714 (H.C.) -- referred to

Ontario (Wheat Producers' Marketing Board) v. Royal Bank (1983), 41 O.R. (2d) 294, 15 E.T.R. 12, 145 D.L.R. (3d) 663 (H.C.), affirmed (1984), 46 O.R. (2d) 362, 9 D.L.R. (4th) 729, (sub nom. Ontario (Wheat Producers' Marketing Board) v. Welland-Port Feed Mill Ltd.) 4 O.A.C. 391 (C.A.) -- considered

Pay Less Gas Co. (1972) v. British Columbia (Director of Employment Standards) (1991), 38 C.C.E.L. 115, 92 C.L.L.C. 14,020 (B.C. S.C.) -- referred to

Phoenix Paper Products Ltd., Re (1983), 48 C.B.R. (N.S.) 113, 44 O.R. (2d) 225, 1 O.A.C. 215, 3 D.L.R. (4th) 617 (C.A.) -- considered

Place Desjardins Inc. v. Perras Fafard Gagnon Inc., [1985] C.A. 212 (Qué.) -- referred to

Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de développement, (sub nom. Federal Business Development Bank v. Québec (Commission de la santé & de la sécurité du travail)) [1988] 1 S.C.R. 1061, (sub nom. Federal Business Development Bank v. Commission de la santé & de la sécurité du travail) 68 C.B.R. (N.S.) 209, 84 N.R. 308, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, [1988] R.D.I. 376 -- distinguished

Quebec (Deputy Minister of Revenue) c. Rainville, [1980] 1 S.C.R. 35, 33 C.B.R. (N.S.) 301, (sub nom. Bourgault v. Quebec (Deputy Minister of Revenue)) 30 N.R. 24, (sub nom. Re Bourgault) 105 D.L.R. (3d) 270 -- followed

R. v. Williams, [1942] A.C. 541, 2 All E.R. 95 (P.C.) -- referred to

Royal Bank v. Nova Scotia (Workmen's Compensation Board), [1936] S.C.R. 560, [1936] 4 D.L.R. 9 -- considered

S.A. Baker & Son Ltd., Re, 32 C.B.R. 147, [1952] O.W.N. 206, [1952] 3 D.L.R. 72 (S.C.) -- considered

Selangor United Rubber Estates Ltd. v. Cradock (bkpt.) (No. 3), [1968] 1 W.L.R. 1555, [1968] 2 All E.R. 1073 (Ch.) -- referred to

Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of) (1991), 35 C.C.E.L. 305, 41 E.T.R. 193, 3 O.R. (3d) 129 (Gen. Div.) -- referred to

Sorochan v. Sorochan, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 46 Alta. L.R. (2d) 97, 2 R.F.L. (3d) 225, 29 D.L.R. (4th) 1, 69 N.R. 81, 23 E.T.R. 143, [1986] R.D.I. 448, [1986] R.D.F. 501, 74 A.R. 67 -- referred to

Superior Propane Inc. v. Tebby Energy Systems (1992), 2 C.L.R. (2d) 144, 9 O.R. (3d) 769, 9 C.P.C. (3d) 330 (Gen. Div.) -- referred to

Tabar v. Scott (1989), 40 C.P.C. (2d) 291, (sub nom. West End Construction Ltd. v. Ontario (Minister of Labour)) 34 O.A.C. 332, 62 D.L.R. (4th) 329, 10 C.H.H.R. D/6491, 70 O.R. (2d) 133, (sub nom. West-End Construction Ltd. v. Ontario (Human Rights Commission)) 90 C.L.L.C. 17,010 (C.A.) -- referred to

Todoshichuk v. Marchenski Lumber Co., 47 C.B.R. (N.S.) 212, [1983] 5 W.W.R. 162, 3 P.P.S.A.C. 2, (sub nom. Re Marchenski Lumber Co.) 146 D.L.R. (3d) 175 (Sask. Q.B.), affirmed 56 C.B.R. (N.S.) 206, [1985] 5 W.W.R. 72, 40 Sask. R. 198, 21 D.L.R. (4th) 318 (C.A.) -- referred to

Young v. Royal Bank (1978), 27 C.B.R. (N.S.) 244, 20 O.R. (2d) 708, 89 D.L.R. (3d) 250 (H.C.) -- applied

Statutes considered:

Bank Act (being Pt. I of s. 2 of Banks and Banking Law Revision Act, 1980, S.C. 1980-81-82-83, c. 40) [R.S.C. 1985, c. B-1; rep. S.C. 1991, c. 46, s. 604] --

s. 178 [R.S.C. 1985, c. B-1, s. 178; re-en. S.C. 1991, c. 46, s. 427]

s. 178(1)(b) [R.S.C. 1985, c. B-1, s. 178(1)(b); re-en. S.C. 1991, c. 46, s. 427(1)(b)]

s. 178(2) [R.S.C. 1985, c. B-1, s. 178(2); re-en. S.C. 1991, c. 46, s. 427(2)]

s. 178(2)(a) [R.S.C. 1985, c. B-1, s. 178(2)(a); re-en. S.C. 1991, c. 46, s. 427(2)(a)]

s. 178(2)(b) [R.S.C. 1985, c. B-1, s. 178(2)(b); re-en. S.C. 1991, c. 46, s. 427(2)(b)]

s. 178(2)(c) [R.S.C. 1985, c. B-1, s. 178(2)(c); re-en. S.C. 1991, c. 46, s. 427(2)(c)]

s. 178(3)(a) [R.S.C. 1985, c. B-1, s. 178(3)(a); re-en. S.C. 1991, c. 46, s. 427(3)(a)]

s. 178(6) [R.S.C. 1985, c. B-1, s. 178(7); re-en. S.C. 1991, c. 46, s. 427(7)]

s. 178(6)(a) [R.S.C. 1985, c. B-1, s. 178(7)(a); re-en. S.C. 1991, c. 46, s. 427(7)(a)]

s. 179 [R.S.C. 1985, c. B-1, s. 179; re-en. S.C. 1991, c. 46, s. 428]

s. 179(1) [R.S.C. 1985, c. B-1, s. 179(1); re-en. S.C. 1991, c. 46, s. 428(1)]

s. 179(4) [R.S.C. 1985, c. B-1, s. 179(7); re-en. S.C. 1991, c. 46, s. 428(7)]

s. 179(7) [R.S.C. 1985, c. B-1, s. 179(12); re-en. S.C. 1991, c. 46, s. 428(12)]

s. 186(1) [R.S.C. 1985, c. B-1, s. 186(1); re-en. S.C. 1991, c. 46, s. 435(1)]

s. 186(2) [R.S.C. 1985, c. B-1, s. 186(2); re-en. S.C. 1991, c. 46, s. 435(2)]

Bank Act, S.C. 1991, c. 46 --

s. 427

Bankruptcy Act, R.S.C. 1970, c. B-3 [R.S.C. 1985, c. B-3] --

s. 2 "secured creditor" [R.S.C. 1985, c. B-3, s. 2 "secured creditor"]

s. 47 [R.S.C. 1985, c. B-3, s. 67]

s. 47(a) [R.S.C. 1985, c. B-3, s. 67(a)]

s. 47(b) [R.S.C. 1985, c. B-3, s. 67(b)]

s. 47(c) [R.S.C. 1985, c. B-3, s. 67(c)]

s. 47(d) [R.S.C. 1985, c. B-3, s. 67(d)]

s. 49 [R.S.C. 1985, c. B-3, s. 69]

s. 50(6) [R.S.C. 1985, c. B-3, s. 72(1)]

s. 57 [R.S.C. 1985, c. B-3, s. 79]

s. 98 [R.S.C. 1985, c. B-3, s. 127]

s. 101 [R.S.C. 1985, c. B-3, s. 130]

s. 102 [R.S.C. 1985, c. B-3, s. 131]

s. 107 [R.S.C. 1985, c. B-3, s. 136]

s. 107(1) [R.S.C. 1985, c. B-3, s. 136(1)]

s. 107(1)(d) [R.S.C. 1985, c. B-3, s. 136(1)(d)]

s. 107(3) [R.S.C. 1985, c. B-3, s. 136(3)]

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

s. 67(a)

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

s. 67(3)

s. 136

Builders' Lien Act, R.S.A. 1980, c. B-12.

Canada Business Corporations Act, S.C. 1974-75-76, c. 33.

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

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

Employment Standards Act, R.S.O. 1980, c. 137 [R.S.O. 1990, c. E.14] --

s. 4(1) [R.S.O. 1990, c. E.14, s. 4(1)]

s. 4(2) [R.S.O. 1990, c. E.14, s. 4(2)]

s. 5(1) [R.S.O. 1990, c. E.14, s. 5(1)]

s. 13(1) [R.S.O. 1990, c. E.14, s. 13(1)]

s. 13(2) [R.S.O. 1990, c. E.14, s. 13(2)]

s. 15 [R.S.O. 1990, c. E.14, s. 15]

s. 29 [R.S.O. 1990, c. E.14, s. 28]

s. 29(1) [R.S.O. 1990, c. E.14, s. 28(1)]

s. 29(2) [R.S.O. 1990, c. E.14, s. 28(2)]

s. 31 [R.S.O. 1990, c. E.14, s. 30]

Labour Standards Act, The, R.S.S. 1978, c. L-1.

Limitations Act, R.S.O. 1980, c. 240 [R.S.O. 1990, c. L.15] --

s. 45(1)(b) [R.S.O. 1990, c. L.15, s. 45(1)(b)]

s. 45(1)(h) [R.S.O. 1990, c. L.15, s. 45(1)(h)]

Limitations of Civil Rights Act, The, R.S.S. 1978, c. L-16.

Mechanics' Lien Act, R.S.N.S. 1967, c. 178 [R.S.N.S. 1989, c. 277].

Pension Benefits Act, R.S.O. 1980, c. 373 [rep. S.O. 1987, c. 35, s. 117] --

s. 23

s. 23(3)

s. 23(4)

Social Service Tax Act, R.S.B.C. 1979, c. 388 --

s. 18

Workers' Compensation Act, S.A. 1973, c. 87 [R.S.A. 1980, c. W-15] --

s. 78(4) [R.S.A. 1980, c. W-15, s. 78(4)]

Workers' Compensation Act, R.S.O. 1980, c. 539 [R.S.O. 1990, c. W.11] --

s. 9 [R.S.O. 1990, c. W.11, s. 11]

Words and phrases considered:

action upon a specialty, -- as used in s. 45(1)(b) of the Limitations Act, R.S.O. 1980, c. 240, includes a claim by employees for compensation for vacation pay and pension benefits accrued but not paid prior to the closure of the company for which they worked.

Action by former employees for compensation for accrued vacation pay and pension benefits not paid prior to closure of employer.

***Wilson J.*:**

1 In this action, 1,200 unionized employees and 11 salaried employees are seeking compensation for vacation pay and pension benefits accrued and not paid prior to the closure of Canadian Admiral Corporation Ltd. ("Admiral"). In advancing their claim, the plaintiffs rely on the statutory deemed trust and lien provisions of s. 23 of the *Pension Benefits Act*, R.S.O. 1980, c. 373 and s. 15 of the *Employment Standards Act*, R.S.O. 1980, c. 137. The rights and priorities of the provincial statutory trusts and liens must be determined in light of the claims of the National Bank of Canada (the "bank") pursuant to security held by the bank under s. 178 of the *Bank Act*, being Pt. I of s. 2 of *Banks and Banking Law Revision Act*, 1980, S.C. 1980-81-82-83, c. 40. The effect, if any, of the subsequent bankruptcy of Admiral must be considered.

2 The novel and complex aspect of this case involves the application of the law to the facts. This case is virtually on all fours with aspects of the decision of Carruthers J. in *Armstrong v. Canadian Admiral Corp. (Receiver of)* (sub nom. *Armstrong v. Coopers & Lybrand Ltd.*) (1986), 53 O.R. (2d) 468 (S.C.), affirmed (1987), 61 O.R. (2d) 129 (C.A.), leave to appeal to S.C.C. refused (sub nom. *National Bank of Can. v. Armstrong* (1988), 87 N.R. 398 (note) ("*Armstrong*"). Armstrong dealt with the entitlement of 55 employees to vacation pay arising out of the receivership of Admiral in 1981. The decision of Carruthers J. was adopted by the Ontario Court of Appeal.

3 The issue for determination is the effect of three Supreme Court of Canada decisions upon *Armstrong: Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (*"Hall"*); *Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de developpement)*, (sub nom. *Federal Business Development Bank v. Québec (Commission de la santé & de la sécurité du travail))* [1988] 1 S.C.R. 1061 (*"FBDB"*); and *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (*"Henfrey Samson"*).

4 It is the position of the defendants that *Armstrong* has been implicitly overruled by the Supreme Court of Canada by these decisions. It is the position of the plaintiffs that *Armstrong* has not been overruled, and that I am therefore bound by it. The constitutional principle of paramountcy must be considered in the context of the three recent Supreme Court of Canada decisions.

5 The Attorney General of Ontario became involved as intervenor in response to a notice of constitutional question served by the defendants on May 15, 1992. The Attorney General of Ontario supports the position of the plaintiffs that the *Bank Act* determines the priority between the parties and that the plaintiffs' claims, pursuant to the *Pension Benefits Act* and the *Employment Standards Act*, have priority to those of the bank.

**Part I -- The Facts**

6 The agreed statement of facts has been considered by me in assessing the factual matters in issue. I am indebted to counsel for their efforts in narrowing the factual issues. The following is a summary of the essential uncontested facts.

7 Admiral manufactured household appliances at several plants in Canada, including plants located in Mississauga (the "Mississauga plant") and Cambridge (the "Cambridge plant"). Since 1979, the bank had valid security pursuant to s. 178 of the *Bank Act* (now s. 427 of the *Bank Act*, S.C. 1991, c. 46). On November 4, 1981, Coopers and Lybrand Limited ("Coopers and Lybrand"), as agents for the bank, took possession of the assets of Admiral, including the Cambridge and Mississauga plants. Effective November 4, 1981, the employment of all employees was terminated and Admiral ceased carrying on business. The possession by the agents for the bank was a result of the default by Admiral under the *Bank Act* security agreement. Beginning November 4, 1981, Coopers and Lybrand, as agents for the bank, immediately began the process of realizing upon the assets. On November 23, 1981, Admiral was petitioned into bankruptcy by other creditors.

8 Coopers and Lybrand went into possession on November 4, 1981, prior to Admiral's bankruptcy, but continued to realize upon the assets for an extended period of time after the bankruptcy. As at May 13, 1989, the bank had realized upon net assets of $45,772,474.67. There remained a shortfall in excess of $11,000,000, plus interest, owing to the bank.

9 The 1,200 unionized employees were subject to collective bargaining agreements at each of the Cambridge and Mississauga plants (the "collective bargaining agreements"). The collective bargaining agreements provide a calculation for vacation pay entitlement based upon years of service and for employer pension benefit contributions. These calculations form the basis of the plaintiffs' claims. The bank was aware that Admiral was subject to the collective bargaining agreements but was not aware of the specific terms concerning the calculation of vacation pay or pension benefits.

10 With respect to the Cambridge plant, the parties acknowledge that the following calculations are correct,

although the defendants do not acknowledge that the amounts are owing:

(a) Accrued vacation pay for the Cambridge plant union employees in the amount of $134,504.13 based upon the collective bargaining agreement years of service.

(b) Accrued vacation pay for the Cambridge plant union employees in the amount of $86,534.62, based upon the 4% calculations specified by the *Employment Standards Act*.

(c) Admiral owed $72,000 to the pension fund, calculated as of November 4, 1981, for unpaid employer pension contributions accrued at both the Cambridge and Mississauga plants.

11 There are two contested factual issues. With respect to vacation pay, the defendants state that no vacation pay is owing in connection with the Mississauga plant. Secondly, the defendants do not concede that there were sufficient appliances assembled at the Mississauga and Cambridge plants between July 1, 1981 and November 4, 1981 upon which the plaintiffs' security interest, if found to be enforceable, could attach.

**Part II -- The Legal Issues**

12 The plaintiffs and defendants raise the following legal issues.

13 1. What is the applicable section of the *Limitations Act*, R.S.O. 1980, c. 240? Is this claim for damages based upon a statute coming within s. 45(1)(*h*) of the *Limitations Act* and, hence, barred by the two-year limitation period? Or, is the claim an action upon a "specialty" coming within s. 45(1)(*b*) and, hence, not barred because the limitation period is twenty years?

14 2. The defendants advanced two estoppel arguments.

15 Firstly, the plaintiffs in the bankruptcy proceedings in 1981 pursued their rights as preferred creditors. They now seek in this action recognition of their rights as secured creditors. Are they estopped by their previous conduct?

16 Secondly, what is the effect, if any, of the plaintiffs' acknowledgement in a written agreement with Inglis (the purchase of some of the Admiral assets) that the collective bargaining agreements in question were null and void? Can the plaintiffs now enforce these collective bargaining agreements in this proceeding?

17 3. If vacation pay is owing to the employees of the Mississauga plant, how is it to be calculated upon termination? Is vacation pay calculated as 4% of earnings from employment or are the employees' rights determined by the more advantageous calculations based upon years of service as specified in the collective bargaining agreements?

18 4. What are the priorities of the parties under the *Bank Act*? The employees rely on the provincial statutory trusts and liens created by provincial legislation and the bank relies on its s. 178 *Bank Act* security. Determination of this issue requires an analysis of the ratio of the *Armstrong* decision, and a determination as to whether *Hall* implicitly overruled *Armstrong*.

19 5. What is the effect of the subsequent bankruptcy, if any, on the priorities of the claims crystallized under

the *Bank Act*? Coopers and Lybrand, as agents for the bank, took possession of the assets of Admiral realizing upon the *Bank Act* security on November 4, 1981. On November 23, 1981, another creditor petitioned Admiral into bankruptcy. Does the *Bank Act* or the *Bankruptcy Act*, R.S.C. 1970, c. B-3 (now the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3) prevail? The determination of this issue requires a review of s. 47 of the *Bankruptcy Act* and an analysis of the applicability of the *FBDB* decision to the facts of this case.

20 6. If the *Bankruptcy Act* overrides the *Bank Act*, what are the priorities of the parties under the *Bankruptcy Act*? A determination of this issue involves the following considerations:

> (i) In light of the bank's possession and liquidation of its security on November 4, 1981, does the *Bank Act* security fall within the definition of "property of the bankrupt" in s. 47 of the *Bankruptcy Act* on November 23, 1981?
>
> (ii) *Henfrey Samson* relates to statutory trusts. Does the presence of the statutory lien retain the employees' status as secured creditors or does their claim fall within the ambit of s. 107(1)(*d*) of the *Bankruptcy Act*, dictating that they must advance their claim as preferred creditors?
>
> (iii) If the subsequent bankruptcy of Admiral is relevant to the priorities under the *Bank Act*, what is the effect of s. 178(6) of the *Bank Act* which requires the bank to make certain payments to employees in the case of a debtor's subsequent bankruptcy?
>
> (iv) *Henfrey Samson* requires a statutory deemed trust to be identifiable or traceable to be recognized in bankruptcy proceedings. As well, common law trusts are recognized in bankruptcy. On the facts of this case, does a common law trust arise against the bank as a result of the bank taking possession and liquidating assets on November 4, 1981? The plaintiff relies on the doctrine of *trustee de son tort*. Alternatively, is there an enforceable common law constructive trust in favour of the plaintiffs?

**Part III -- Findings on Contested Factual Issues**

***Vacation Pay for Mississauga Plant***

21 What, if any, is the vacation pay owing to the employees of the Mississauga plant?

22 The plaintiffs are 1,200 unionized employees and 11 salaried employees. It was agreed between counsel that a sample number of employees would be called from each group from the Mississauga plant to explain the calculation of vacation pay entitlements on behalf of all the plaintiffs. Three hourly employees, Cynthia Blackmore, Rona Soederhuyzen and Peter Murcar, gave evidence concerning the collective bargaining agreement. Nick Vuk and Fred Soederhuyzen gave evidence as representatives of the salaried employees. In addition, Elizabeth McKnight and Karen O'Blenis from the personnel and payroll department gave evidence about the method of calculating vacation pay.

23 The correct interpretation of the documentation substantiating the plaintiffs' vacation entitlement claim for the Mississauga plant, outlined at Schedule "C" of the statement of claim and Tab 4 of Exhibit "1" (the Mississauga vacation schedule), is at the heart of the first factual dispute. At first blush, and without the explanation by the representatives from the personnel and payroll department, the Mississauga vacation schedule is difficult

to understand.

24 The union employees' entitlement to vacation pay is stipulated in paragraph 18.01 of the Mississauga collective bargaining agreement. A schedule of increasing vacation entitlement is calculated based upon years of service. The initial calculation for employees with five years of service or less is 4% of annual pay or two weeks paid vacation. Employees were entitled to increases at specific intervals based upon years of service, the maximum entitlement for long term employees being 12%, or six weeks paid vacation.

25 It is undisputed that the 11 salaried employees' vacation benefits mirrored the union employees' entitlement based upon years of service, although there was no written contract to this effect. The terms of the union contract and the *Employment Standards Act* provide that the plaintiffs' vacation entitlement accumulates in arrears. The vacation pay entitlement crystallizes after a year of complete service. The prior year gives rise to vacation pay entitlements in the succeeding year. The union contract year begins July 1 and concludes June 30 of the following year.

26 With a few minor exceptions noted later, all of the plaintiffs received their vacation entitlements for the union contract period ending June 30, 1981. The primary issue in dispute is the vacation entitlement of employees of the Mississauga Plant from July 1 to November 4, 1981.

27 The plaintiffs are in the somewhat difficult position of proving that they did not receive vacation pay. The employees were told by Admiral, on November 4, 1981, that their employment was terminated. The instructions of Coopers and Lybrand after the termination announcement was made were that the employees were to im mediately vacate the building. Most plaintiffs did not return, and, with the exception of one plaintiff, Peter Murcar, they did not personally have supporting documentation in the form of pay stubs to substantiate their claims. The plaintiffs proved the facts through viva voce testimony and through a review of the documents provided by the defendants, with particular emphasis on the Mississauga vacation schedule. The evidence was not clear as to who prepared the Mississauga vacation schedule. It was either prepared by Admiral or, alternatively, perhaps by Coopers and Lybrand. It is clear, however, that the document was in the possession of Coopers and Lybrand as a result of their work as agents of the bank.

28 The confusion in the interpretation of the Mississauga vacation schedule arises from negative figures appearing in column 7 called "vac to pay". The evidence of the payroll staff is that this figure is a comparative figure. It represents a calculation of vacation pay accrued and earned for the current union contract year contrasted with vacation pay paid in the previous year. A negative figure in the "vac to pay" column indicates that more vacation pay was earned and paid in the previous union contract year than in the partial year to date, from July 1, 1981 to November 4, 1981. The defendants, on the other hand, submit that the negative figure in the "vac to pay" column is a calculation of the amount owed by the employee to the employer. As I will endeavour to show, I accept the explanation of the comparative meaning of the "vac to pay" column given by the payroll staff.

29 In looking at the Mississauga vacation schedule, the calculation of the plaintiffs' loss is represented by the sum total of the handwritten figures in the far right of the schedule as it appears at Tab 4 of Exhibit "1". This critical calculation was omitted from the Mississauga vacation schedule attached to the statement of claim as Schedule "C". The defendants' confusion and concern about the calculations in the Mississauga vacation schedule is, therefore, understandable.

30 Once the meaning of the Mississauga vacation schedule is understood, the calculation of the amount owing is specified and ascertainable. Each union and salaried employee's entitlement to vacation pay is the product of the employee's earnings for the year to date times a percentage calculated based on the number of years of completed service as calculated in sections 18.01 and 18.06(g) of the collective bargaining agreement. The total of the plaintiffs' claim based upon the Mississauga vacation schedule is for the period of July 1 to November 4, 1981.

31 The defendants chose not to call any evidence on the factual issues. A brief of documents was filed by the parties as Exhibit "10", Volumes 1 and 2.

32 There are several documents relating to vacation pay which are important in assessing the viability of the defendants' position. These include documents which were prepared by Coopers and Lybrand with calculations of vacation pay accrued, which closely accord with the calculations on the Mississauga vacation schedule. Some documents were submitted that were in the possession of Coopers and Lybrand but may not have been prepared by them.

33 Coopers and Lybrand were aware of the issue of vacation pay prior to taking possession of Admiral's assets. Exhibit "10", Tab 17, is a telex dated October 29, 1981 outlining the strategy to be taken by Coopers and Lybrand when they went into possession of Admiral on November 4, 1981. Page 5 of that document confirms that the employees' salaries and fringe benefits would be paid and "vacation pay liability will be considered in due course."

34 Exhibit "10", Tab 2, is an excerpt of a report prepared by Coopers and Lybrand, dated November 27, 1981, shortly after they went into possession as agents for the bank. The unfunded employee deductions and benefits for the Mississauga plant for vacation pay, as calculated in the Coopers and Lybrand report, are as follows:

35 Vacation Accrual -- July 1 -- October 31, 1981 ..... $187,848

36 1981 Vacations Owed to June 30, 1981 ..... 4,656

37 Exhibit "10", Tab 8, is a detailed handwritten calculation of vacation pay owing for 1980-1981. The evidence given by Nick Vuk and Fred Soederhuyzen about vacation pay owed to each of them individually is confirmed by the calculations which appear opposite their names in this document. The evidence was not clear as to whether a representative from Coopers and Lybrand or from Admiral prepared this document.

38 Exhibit "10", Tab 10, appears to make it clear that the vacation pay entitlements were cross-checked by the accounting staff of either Admiral or Coopers and Lybrand in December 1981.

39 The abrupt and unexpected closure of Admiral was clearly a traumatic event in the lives of the plaintiffs who gave evidence. Their evidence of the events surrounding the plant closure was vivid. Immediately or shortly after the closure, many employees raised concerns about their vacation pay. I find that all of the witnesses were credible and gave their evidence in a straightforward, totally believable fashion. Understandably, given the passage of time, some of the finer details were hazy. Interpreting the Mississauga vacation schedule was difficult, as the plaintiffs did not prepare the complex document. Taken as a whole, however, I find that the thrust of their evidence was unequivocal. The union and salaried employees of the Mississauga plant did not receive their va-

cation pay accrued during the period beginning July 1, 1981 to the date of the plant closure on November 4, 1981.

40 The defendants make the submission that for three of the 1,200 employees, an unexplained amount is shown in the comparative "vac to pay". It is of note that the date of hire for these three employees was after the beginning of the current union contract year and, therefore, there should logically be no entry in the "vac to pay" column. The defendants, therefore, submit that the "vac to pay" column must represent something other than a comparison of vacation benefits accrued in the previous year compared with the current year, therefore undermining the plaintiffs' evidence. A plausible explanation was given by the representatives from the payroll department that perhaps, in these isolated cases, an employee worked for a short period of time during the previous year, giving rise to an entry in the "vac to pay" column, and was rehired. This would effectively change the employee's start date recorded on the Mississauga vacation schedule and effectively explain the entry. This answer is consistent with the overwhelming weight of the evidence, including the documentary reports prepared by Coopers and Lybrand, or in their possession, which show the vacation pay owing.

41 Based upon the plaintiffs' evidence and a review of the documents, I find that none of the plaintiffs from the Mississauga plant received their vacation entitlements for the period July 1 to November 4, 1981. A small number of employees have back pay owing from the pervious contract year. There are some minor discrepancies between the calculations in the Mississauga vacation schedule and the documents prepared by or in the possession of Coopers and Lybrand. I find that the amount owed for the Mississauga plant for the period July 1 to November 4, 1981, is $193,339.09. I accept the calculation of the amounts owed for the previous year ending June 30, 1981 as $4,656 which is the amount reflected in the Coopers and Lybrand report found at Exhibit "10", Tab 2.

***The Assembly of Appliances at Admiral -- July 1, 1981 to November 4, 1981***

42 The contest between the employees and the bank relates to security rights in after-acquired property. It is the view of the plaintiffs that, after inventory and parts were brought to Admiral and as work was performed by the employees, lien rights were created in their favour. The lien rights attached to after-acquired property consisting of the parts assembled into appliances. The plaintiffs state that a portion of the assets realized by the bank was, in fact, their property. The plaintiffs claim that their property is the amounts owed pursuant to statutory deemed trusts and liens established by the *Employment Standards Act* and the *Pension Benefits Act*.

43 The defendants' first position is that the *Bank Act* security has absolute priority over the plaintiffs' claim. Their alternative position is that the plaintiffs have failed to prove there were sufficient appliances assembled between July 1 and November 4, 1981 upon which the plaintiffs' security interest, if found to be enforceable, could attach. The turnaround time for parts and the number of appliances assembled between July 1, 1981 and November 4, 1981, therefore, must be analyzed.

44 The evidence of Nick Vuk, the assembly line manager of refrigerators and micro-range products in the Mississauga plant, is important. The Admiral operations at the Mississauga plant consisted of five assembly lines which produced refrigerators, dryers, stoves and other appliances. Mr. Vuk had kept copies of all of the production records for the Mississauga plant for the period in question. Most of the inventory and parts had a 4-5 day turnaround from arrival of parts to assembled appliances which were shipped to their wholesale destination. Compressors were the exception and arrived twice a month. Screws were ordered in volume on a monthly

basis.

45 Records were kept each day as to projected production and actual production achieved on the various assembly lines.

46 Although the overtime for 1981 ended during the last week of March 1981, the assembly lines were busy through to November 1981, and additional staff was hired right up to the time of Admiral's closure.

47 Without doubt, the labour conducted by the employees added value to the products. The evidence of Mr. Vuk was that the labour cost per unit approximated $35 including overhead. The added value over inventory cost and labour cost of the wholesale price of an appliance, as a result of the labour, was estimated by Mr. Vuk as being approximately $100 per appliance. He was familiar with the figures as, in his position as assembly line manager, he was aware of per unit costs of parts and labour. Employees were given the opportunity of purchasing Admiral products for wholesale prices. He had personally purchased goods at the wholesale prices.

48 A significant number of appliances were assembled at the Mississauga and Cambridge plants between July 1 and November 4, 1981.

49 Exhibit "12B" outlines actual assembly line production for the Mississauga plant from July 1, 1981 to October 31, 1981. Exhibit "13" is a summary of the unfinished work in progress on hand shortly after the Mississauga plant closure. There were five assembly lines at the Mississauga plant. Assembly lines 1 to 3 were for refrigerators of differing sizes and quality. The fourth and fifth assembly lines were for dryers and micro-ranges. For example, assembly line number 1 at the Mississauga plant produced 19,099 refrigerator units for the four-month period. Using Mr. Vuk's estimate of average cost per unit of $300 to $350 for parts and labour, it is obvious that there was ample after-acquired property created at the Mississauga plant upon which the plaintiffs' lien could attach during the period in question.

50 The evidence concerning the Cambridge plant was less abundant. In Exhibit "12B", the projected assembly of appliances for the Cambridge plant for November 1981 is outlined. There were three assembly lines for washing machines, dryers and dishwashers. To interpret the projections for the Cambridge plant, I rely on both the Cambridge plant projections, and the record of actual production for the Mississauga plant. Exhibit "12B" outlines daily records of actual production for the Mississauga plant on each assembly line, compared to projected production.

51 I note that for the Mississauga plant, actual production closely resembled or exceeded projections for the period July 1 to October 31, 1981. I note further that projections for Mississauga for November were consistent with past production during the four-month period in question, taking into account the summer vacation of three weeks. For example, in Exhibit "12B", the projected production for line 1 for Mississauga for November was 5,000 units. The average production for line 1 for the period July 1 to October 30 was 4,774 units (19,099 divided by 4). The projected production for assembly line 1 for Mississauga for November 1981, therefore, closely reflected actual production for the previous four months. I infer that the average actual production for July 1 to October 31 is slightly lower than projected production for November due to the 3-week plant shutdown during July and August.

52 I conclude by inference that the projected production for the Cambridge plant reflects past production

achieved. Therefore, during the period July 1 to November 4, 1981, at both the Mississauga and Cambridge plants, more than sufficient after-acquired property was created in the form of assembled appliances upon which the plaintiffs' security interest, if found to be enforceable, could attach.

**Part IV -- Statutory Framework**

53 It is important to understand the competing statutory regimes.

54 The plaintiffs rely on sections 15, 29, and 31 of the *Employment Standards Act* and subsections 23(3) and (4) of the *Pension Benefits Act*.

55 Sections 15, 29 and 31 of the *Employment Standards Act* provide as follows:

> 15. Every employer shall be deemed to hold vacation pay accru ing due to an employee in trust for the employee whether or not the amount therefor has in fact been kept separate and apart by the employer and the vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account whether so entered or not.
>
> . . . . .
>
> 29. -- (1) Every employer shall give to each employee a vacation with pay of at least two weeks upon the completion of each twelve months of employment.
>
> (2) The amount of pay for such vacation shall be not less than an amount equal to 4 per cent of the wages of the employee in the twelve months of employment for which the vacation is given and in calculating wages no account shall be taken of any vacation pay previously paid.
>
> . . . . .
>
> 31. Where the employment of an employee ceases before the completion of a twelve month period of employment or the employee has not been given a vacation with pay pursuant to section 29, the employer shall pay to the employee an amount equal to 4 per cent of the wages of the employee in any twelve month period or periods or part thereof and in calculating wages no account shall be taken of any vacation pay previously paid.

56 Subsections 23(3) and (4) of the *Pension Benefits Act* provide as follows:

> (3) Where an employer is required to make contributions to a pension plan, he shall be deemed to hold in trust for the members of the plan an amount calculated in accordance with subsection (4), whether or not,
>
> (*a*) the employer contributions are payable into the plan under the terms of the plan or this Act; or
>
> (*b*) the amount has been kept separate and apart by the employer,
>
> and the members have a lien upon the assets of the employer in such amount that in the ordinary course of business would be entered into the books of account whether so entered or not.

(4) For the purpose of determining the amount deemed to be held in trust under subsection (3) on a specific date, the calculation shall be made as if the plan had been wound up on that date.

57 What are the features of the provincial legislation in question? The legislation involves laws of general application applicable to all employees in the province without distinction. It is agreed that the relevant statutory provisions are intra vires of the province. They were enacted pursuant to the provincial constitutional authority of property and civil rights. Looking at s. 15 of the *Employment Standards Act* and s. 23(3) of the *Pension Benefits Act*, it is clear that there is both a trust and a separate lien created to protect the employees. The provincial statutory provisions elevate the employees' entitlement beyond simple debt in a creditor/debtor relationship. The provincial legislation creates a lien against assets in the amount of the trust claim.

58 The priority of the plaintiffs' claim advanced pursuant to the provincial legislation must be considered in the context of the relevant sections of the *Bank Act* or the *Bankruptcy Act*.

***The Bank Act***

59 The three relevant statutory provisions of the *Bank Act* are sections of 178, 179 and 186. They are reproduced below:

178. (1) A bank may lend money and make advances,

. . . . .

(*b*) to any person engaged in business as a manufacturer, on the security of goods, wares and merchandise manufactured or produced by him or procured for such manufacture or production and of goods, wares and merchandise used in or procured for the packing of goods, wares and merchandise so manufactured or produced,

. . . . .

and the security may be given by signature and delivery to the bank by or on behalf of the person giving the security of a document in the form set out in the appropriate schedule or in a form to the like effect.

(2) Delivery of a document giving security on property to a bank under the authority of this section vests in the bank in respect of the property therein described

(*a*) of which the person giving security *is the owner* at the time of the delivery of the document, or

(*b*) of which that person *becomes the owner at any time* thereafter before the release of the security by the bank, whether or not the property is in existence at the time of the delivery,

the following rights and powers, namely,

(*c*) if the property is property on which security is given under paragraph (1)(*a*), (*b*), (*e*), (*f*) or (*i*), under paragraph (1)(*c*) or (*h*) consisting of agricultural implements or under paragraph (1)(*j*) consisting of forestry implements, *the same rights and powers as if the bank had acquired a warehouse receipt or bill of lading in which such property was described*,

. . . . .

(3) Where security on any property is given to a bank under any of paragraphs (1)(*c*) to (*j*), *the bank, in addition to and without limitation of any other rights or powers vested in or conferred on it, has full power*, right and authority, through its officers, employees or agents, in the case of

(*a*) *non-payment* of any of the loans or advances for which the security was given,

. . . . .

*to take possession of or seize the property* covered by the security, ...

179. (1) All the rights and powers of a bank in respect of the property mentioned in or covered by a warehouse receipt or bill of lading acquired and held by the bank, and those rights and powers of the bank in respect of the property covered by a security given to the bank under section 178 that are the same as if the bank had acquired a warehouse receipt or bill of lading in which such property was described, have, subject to subsection 178(4) and subsections (2) and (3) of this section, priority over all rights subsequently acquired in, on or in respect of such property...

. . . . .

(4) In the event of non-payment of any debt, liability, loan or advance, as security for the payment of which a bank has acquired and holds a warehouse receipt or bill of lading or has taken any security under section 178, the bank may sell all or any part of the property mentioned therein or covered thereby and apply the proceeds against such debt, liability, loan or advance, with interest and expenses, returning the surplus, ...

. . . . .

(7) Where goods, wares and merchandise are manufactured or produced from goods, wares and merchandise, or any of them, mentioned in or covered by any warehouse receipt or bill of lading acquired and held by a bank or any security given to a bank under section 178, the bank has the same rights and powers in respect of the goods, wares and merchandise so manufactured or produced, as well during the process of manufacture or production as after the comple tion thereof, and for the same purposes and on the same conditions as it had with respect to the original goods, wares and merchandise.

. . . . .

186. (1) A bank may acquire and hold any warehouse receipt or bill of lading as security for the payment of any debt incurred in its favour, or as security for any liability incurred by it for any person, in the course of its banking business.

(2) Any warehouse receipt or bill of lading acquired by a *bank under subsection (1) vests in the bank, from the date of the acquisition thereof,*

(*a*) all the right and title to the warehouse receipt or bill of lading and to the goods, wares and merchandise covered thereby of the previous holder or owner thereof; and

(*b*) all the right and title to the goods, wares and merchandise mentioned therein of the person from whom the goods, wares and merchandise were received or acquired by the bank, if the warehouse

> receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of the goods, wares and merchandise. (emphasis added)

60 The issue for determination is the priority of the parties to the after-acquired property. The bank security was given prior in time to when the plaintiffs' trusts and liens arose. Is the bank security subject to the plaintiffs' statutory trusts and liens? These issues will be discussed in depth in reviewing the *Armstrong* and *Hall* decisions.

***The Bankruptcy Act***

61 It is the defendants' submission that the provisions of the *Bankruptcy Act* prevail, superseding the priorities determined pursuant to the *Bank Act*. The relevant statutory provisions of the *Bankruptcy Act* are s. 47 and s. 107(1)(*d*) reproduced below:

> 47. The property of a bankrupt divisible among his creditors shall not comprise
>
> (*a*) property held by the bankrupt in trust for any other person,
>
> (*b*) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,
>
> but it shall comprise
>
> (*c*) all *property* wherever situated *of the bankrupt at the date of his bankruptcy* or that may be acquired by or devolve on him before his discharge, and
>
> (*d*) such *powers* in or over or *in respect of the property* as might have been *exercised by the bankrupt for his own benefit*. R.S., c. 14, s. 39.
>
> . . . . .
>
> 107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> . . . . .
>
> (*d*) *wages, salaries, commissions or compensation* of any clerk, servant, travelling salesman, *labourer or workman* for services rendered during three months next preceding the bankruptcy to the extent of five hundred dollars in each case; ... (emphasis added)

**Part V -- The Threshold Legal Issues**

***Limitations Issue***

62 The plaintiffs commenced this action on June 3, 1987, almost six years after their employment was terminated by Admiral. The defendants submit that the statutory claim of the plaintiffs is barred by the two-year limitation period provided for in s. 45(1)(*h*) of the *Limitations Act*. The plaintiffs and the Attorney General of Ontario state that s. 45(1)(*h*) is not applicable to the facts of this case. They submit that this is an action upon a specialty

and, therefore, that the twenty-year limitation period in s. 45(1)(*b*) of the *Limitations Act* applies.

63 The following are the relevant sections of s.45(1) of the *Limitations Act*:

> 45. -- (1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned,
>
> . . . . .
>
> (*b*) an action upon a bond, or other specialty, ...
>
> . . . . .
>
> within twenty years after the cause of action arose,
>
> . . . . .
>
> (*h*) an action for a penalty, damages, or a sum of money given by any statute to the Crown or the party aggrieved, within two years after the cause of action arose; ...

64 What is an action upon a specialty? The Court in *R. v. Williams* , [1942] A.C. 541 (P.C.) describes the concept of specialty as follows at p. 555:

> The word "specialty" is sometimes used to denote any contract under seal, but it is more often used in the sense of meaning a specialty debt, that is, an obligation under seal securing a debt or a debt due from the Crown or under statute: see *Royal Trust Co. v. Attorney General for Alberta.* [Citation omitted.]

65 The decision of *Carlyle v. Oxford (County)* (1914), 30 O.L.R. 413 (C.A.) ("*Carlyle*") appears to be the root of the Ontario case law concerning the meaning of specialty. In *Carlyle*, the plaintiff brought an action to recover arrears of salary. He had been paid less than the minimum prescribed by the *Public Schools Act*. His personal representative continued the action after his death. In dealing with the issue of limitations, the Court held that the plaintiff's claim was upon a specialty and the cause of action was not statute barred. The action was one of debt on the statute, the Court said, and, hence, an action upon a specialty. The obligation to pay imposed by the statute was absolute and did not depend on contract. This approach was followed in *Ontario (Teachers' Pension Plan Board) v. York University* (1990), 74 O.R. (2d) 714 (H.C.).

66 Simply put, a statutory obligation creating or recognizing a debt is a specialty and a debt "on a statute" with a twenty-year limitation.

67 What is the distinction between a specialty action of a debt "on a statute", and "an action for a penalty, damages or a sum of money given by any statute", as outlined in s. 45(1)(*h*)?

68 I was presented with somewhat convoluted arguments about the distinction between rights "on a statute" and "given by a statute". It appears from reviewing the cases that the defendants' emphasis on the words "given by any statute" in s. 45(1)(*h*) may be misapplied. The intended scope of s. 45(1)(*h*) of the *Limitations Act* has been considered in obiter comments given by the Ontario Court of Appeal. In *Tabar v. Scott* (sub nom. *West End Construction Ltd. v. Ontario (Minister of Labour)*) (1989), 34 O.A.C. 332 (C.A.), Finlayson J.A. states, at p. 342, that the section is limited to penal actions:

> If I was obliged to consider the matter from this perspective, I do not think I could ignore the reasons of Lindley, M.R., in *Clanmorris*. When a judge of his experience and reputation stated so baldly that the genesis of s. 45(1)(h) referred to "penal actions" and based that assertion on "the history of the Act, and from a knowledge of the then state of the law and the defect which was to be cured", it hardly lies in my mouth to contradict him. Certainly no one else has. Despite *Robinson v. Essex*, I do not think that s. 45(1)(h) has any application to the remedies sought under the Code. Even if the complaint of Tabar can be construed as an "action", it is not a penal action and s. 45(1)(h) does not apply.

69 The obiter comments of Finlayson J.A. were followed in *Superior Propane Inc. v. Tebby Energy Systems* (1992), 9 O.R. (3d) 769 (Ont. Ct. (Gen. Div.)). Section 45(1)(*h*) is interpreted as being limited to penal actions. Justice Austin (as he then was) concludes at p. 775:

> As the present action is not penal in any way, shape or form and has nothing to do with any sum of money given by any statute, it is unlikely that it was intended to apply to claims for contribution or indemnity under s. 2 of the *Negligence Act*.

70 I, therefore, conclude that the plaintiffs' claim is a specialty action pursuant to s. 45(1)(*b*) of the *Limitations Act* and the limitation period is twenty years.

***The Effect of the Employees' Agreement with Inglis***

71 As outlined in the agreed statement of facts, Inglis Limited ("Inglis") purchased the assets of Admiral from the secured creditors in March 1982. At that time, Inglis entered into collective bargaining agreements with some of the employees of Admiral which contained the clause "any agreements and understandings between Canadian Admiral Corporation, Ltd. and the Union are null and void and of no further force and effect" (the "agreement"). The defendants submit that the agreement had the effect of discharging Admiral from its obligations under its collective bargaining agreements with the employees and, accordingly, that Admiral was no longer liable to the employees for vacation pay and pension benefits for the period in which they were employed by Admiral.

72 The purpose of the agreement signed by the employees was to avoid Inglis being characterized as a successor corporation. Not all of the plaintiffs in this proceeding signed the agreement and not all of Admiral's employees were hired by Inglis.

73 The defendants urge me, in effect, to treat the agreement as a release upon which they can rely. I do not think this is the correct characterization of the clause in question. The defendants were not a party to the agreement. The doctrine of privity of contract prevents the defendants as third parties from relying upon the agreement as either a shield or a sword. See *Greenwood Shopping Plaza Ltd. v. Beattie*, [1980] 2 S.C.R. 228.

74 The intended scope of the clause was to protect Inglis, not the defendants. I note that, at about the time the agreement was entered into, the plaintiffs were taking steps to attempt to enforce their rights to vacation pay and pension benefits in the context of Admiral's bankruptcy proceedings. I find that the facts of this case do not fall within the narrow exception to the general rule specified in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299. There is no express or implied stipulation by the contracting parties that the clause was intended to benefit the defendants as implicit or unexpressed third party beneficiaries.

75 Furthermore, and perhaps more importantly, the obligations of Admiral to pay vacation pay and pension benefits are statutory ones. The collective bargaining agreements merely provide the basis for the calculation of benefits owed. The plaintiffs in this proceeding assert their claims based upon recovery of debts stipulated in s. 15 of the *Employment Standards Act* and section 23 of the *Pension Benefits Act.*

76 I conclude, therefore, that the defendants cannot rely upon the agreement with Inglis.

***The Effect of the Plaintiffs' Claim in Bankruptcy***

77 In the bankruptcy proceedings in 1981, the plaintiffs pursued their rights as preferred creditors under s. 107(1)(*d*) of the *Bankruptcy Act.* They now seek recognition of their status as secured creditors under the provincial legislation. Are they estopped by their previous conduct?

78 To be estopped from advancing a claim as a secured creditor, the facts must disclose that the actions of the creditor amounted to an unequivocal, unconditional and irrevocable surrender of the security. See *Andrew v. FarmStart* (1988), 54 D.L.R. (4th) 406 (Sask. C.A.); leave to appeal to Supreme Court of Canada refused. No such facts are present in the evidence before me.

79 From a review of the cases, it is clear that filing a proof of claim as an unsecured creditor is not an irrevocable or unconditional act: I rely upon *Re Mount James Mines (Quebec) Ltd.* (1980), 33 C.B.R. (N.S.) 227 (Ont. S.C.); *Cadillac Explorations Ltd. v. Kilborn Engineering Ltd.* (1983), 51 B.C.L.R. 221 (C.A.); *Young v. Royal Bank* (1978), 20 O.R. (2d) 708 (H.C.); and *Re Canadian Exotic Cattle Breeders' Co-operative* (1979), 14 B.C.L.R. 183 (S.C.).

80 I, therefore, conclude that the claim advanced by the plaintiffs in the bankruptcy proceedings in 1981 does not preclude them from pursuing their claim as secured creditors in this action.

***Calculation of Vacation Pay***

81 Is the vacation pay owing at the Mississauga and Cambridge plants calculated upon termination at the rate of 4% or based upon years of service?

82 Sections 4 and 5 of the *Employment Standards Act* must be considered. They provide:

> 4. -- (1) An employment standard shall be deemed a minimum requirement only.
>
> (2) A right, benefit, term or condition of employment under a contract, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard. 1974, c. 112, s. 4.
>
> 5. -- (1) Where terms or conditions of employment in a collective agreement as defined in the *Labour Relations Act* confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.

83 The relevant provision of the collective bargaining agreement for the Mississauga plant is

> 18.07 Any employee who voluntarily quits, or is *laid off, will be entitled to the vacation benefits as per the terms of the Collective Bargaining Agreement.* (emphasis added)

84 For the Cambridge plant the relevant provisions of the collective bargaining agreement are:

> 11.03 (A) Employees who have been *laid off*, retire, or terminate voluntarily or for health reasons during the vacation year, *will be paid vacation pay to the amount of 4, 6, 8, 10 or 12 percent, whichever figure is applicable* to his gross earnings for the vacation year.
>
> (B) *Employees who cease to be employees (except as per (A) above) shall receive four percent (4%)*, or whichever is applicable, of his gross earnings of the vacation year. (emphasis added)

85 The defendants take the position that involuntary termination is not covered by the collective bargaining agreements, and, therefore, the less favourable 4% provisions of the *Employment Standards Act*, or s. 11.03(B), apply. "Laid off", according to the defendants, relates to a temporary, not a permanent, termination of employment. The plaintiffs, on the other hand, contend that the collective bargaining agreements apply, and that the plaintiffs' claim is covered by the term "laid off" in the collective bargaining agreements.

86 Can "involuntary termination" and "laid off" be read as synonymous terms? The following are two definitions of "layoff": the first is from the D.A. Dukelow and B. Nuse, *Dictionary of Canadian Law* (Scarborough: Carswell, 1991) and the second is taken from *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990). They are as follows:

> LAY-OFF var. LAYOFF. n. 1. Temporary or *indefinite termination* of employment because of lack of work.
>
> *Layoff. A termination* of employment at the will of employer. Such may be temporary (e.g. caused by seasonal or adverse economic conditions) *or permanent.* (emphasis added)

87 It is clear from the definitions that the term "layoff" or "laid off" contemplates both temporary and permanent loss of employment and would include involuntary termination.

88 The decision of *Gray v. Canada (Attorney General)* (1977), 18 N.R. 393 (Fed. C.A.) reviews the meaning of the term "layoff" in the context of a collective agreement. Heald J. states, at p. 397:

> The generally accepted definition of "lay-off" when used as a labour term is: "Temporary, prolonged, or final separation from employment as a result of lack of work" (C.C.H. Canadian Limited -- *Canada Labour Terms* 1975 6th Edition, p. 44).

89 In my opinion, the term "laid off", which appears in the collective bargaining agreements, includes both temporary and permanent involuntary termination of employment. I, therefore, find that the employees' vacation pay entitlements in the case of the Cambridge plant are governed by s. 11.03(A) with their vacation pay entitlements being calculated in accordance with the collective bargaining agreement. I make a similar finding for the employees of the Mississauga plant. Accordingly, the employees' entitlements to vacation pay are to be calcu-

lated in accordance with the terms specified in section 18 of the collective bargaining agreement based upon years of service.

**Part VI -- The Bank Act, Armstrong and the Hall Decision**

90 The defendants state that *Armstrong* was implicitly overruled by the Supreme Court of Canada by the effect of the *Hall, FBDB* and *Henfrey Samson* decisions. As well, it is their position that Carruthers J. in *Armstrong* relied upon decisions, including *Re Phoenix Paper Products Ltd.* (1983), 44 O.R. (2d) 225 (C.A.) ("*Phoenix Paper*"), which were explicitly overruled by the Supreme Court of Canada. Therefore, the defendants argue that the critical legal ratio underlying *Armstrong* is no longer valid law.

91 An overview of the *Armstrong* decision will be followed by an analysis of the *Hall* decision. The ratio of *Armstrong* will then be considered in the context of the reasons for judgment in *Hall*.

***The Issues and Facts in Armstrong***

92 *Armstrong* involved the claims of 55 employees of Admiral. Their first claim was for vacation pay. To advance this claim, the plaintiffs relied on s. 15 of the *Employment Standards Act* as do the plaintiffs in this action. In the alternative, the employees in *Armstrong* claimed for vacation pay pursuant to s. 178(6) of the *Bank Act*. The plaintiffs in this action make the same alternative claim. The second claim by the plaintiffs in *Armstrong* was for severance and termination payments. A parallel claim is not being advanced by the plaintiffs in this action.

***The Findings of Carruthers J.***

93 At the heart of the Carruthers J. decision is his description of how vacation pay accrues at p. 474 [53 O.R. (2d)]:

> Of importance to me is that s. 15 specifically provides that this amount, which I conclude accrues due to the employee on each day of employment, is deemed to be held in trust for the employee by the employer whether or not it has, in fact, been kept separate. Of equal importance to me is that the same section specifically provides that the amount so held in trust constitutes a lien and charge upon the assets of the employer. This situation also exists on each day of the employee's employment.

94 The *Armstrong* case was presented and argued by the parties on the basis that the *Bank Act* determined priorities.

95 As outlined by Carruthers J. on p. 475, the floating and qualified nature of the *Bank Act* security permitted Admiral to carry on business including the acquisition of inventory and assembly of products for sale in the ordinary course of business. The deemed statutory trusts and liens arose daily as work was performed and attached as assets were acquired by Admiral. The amounts claimed by the plaintiffs, therefore, became a lien or charge upon Admiral's assets prior to their assignment to the bank.

96 The crux of this case revolves around the respective rights of the parties to after-acquired property. Carruthers J. explained the sequential process of the parties acquiring rights in after-acquired property. I pause, therefore, to review his explanation of the qualified nature of *Bank Act* security and s. 178 of the *Bank Act*.

97 Section 178 security gives to a bank both the rights and obliga tions of an owner. The assignment to the bank of the rights in after-acquired property is, therefore, subject to the plaintiffs' trust and liens. Carruthers J. held at pp. 479-480:

> It is clear that when a bank first takes the goods of a manufacturer as security under s. 178 and the goods are then in existence, the *bank cannot receive any greater right or title to those goods than the manufacturer itself possessed.* It is anticipated by the *Bank Act* that in the ordinary course of the manufacturer's business those goods will be disposed of and replaced by "after-acquired property" ...
>
> To my mind, it is only the process of *attachment which is automatic, and that only occurs after Admiral "becomes the owner" of the after-acquired property.* ... Admiral first *is the "owner"*, or first "*becomes the owner" of the goods described in the banks' security documents.* Admiral then assigns its interests in those goods to the bank, albeit, "automatically", in most cases, on after-acquired property. The *Bank Act* does recognize that a bank can have directly delivered to it the warehouse receipt or bill of lading of goods delivered to the debtor. *It is only by the assignment that the bank becomes vested with all the right and title of the debtor, which, in this case, is the manufacturer, Admiral.*
>
> *Here, there can be no question that Admiral had no right and title at any time to the amount of the deemed trust created under s. 15 of the E.S.A. Likewise, Admiral during the currency of the banks' security, could not assign to the banks the interest covered by the lien or charge placed upon its assets by virtue of the provisions of s. 15 of the E.S.A.* (emphasis added)

98 Carruthers J., therefore, found in favour of the plaintiffs, recognizing their claim pursuant to s. 15 of the *Employment Standards Act*. Carruthers J. further concluded that, if he had not found the employees entitled to vacation pay pursuant to s. 15 of the *Employment Standards Act*, he would have recognized their claim as being included in the definition of "wages, salaries or other remuneration", in s. 178(6)(*a*) of the *Bank Act*.

99 On the second issue relating to the claim for severance and termination payments, Carruthers J. dismissed the plaintiffs' claims. He found, first, that Coopers and Lybrand was not a successor employer within the meaning of s. 13(1) or (2) of the *Employment Standards Act*. Coopers and Lybrand's sole intention was to liquidate assets on behalf of the bank. Further, Carruthers J. found that s. 178(6) was not applicable as Coopers and Lybrand had gone into possession prior to the bankruptcy.

***Decision of the Ontario Court of Appeal***

100 The Ontario Court of Appeal's decision of Houlden J.A. upholds the decision of Carruthers J. in *Armstrong*.

101 On the issue of vacation pay, the Court concurred with the reasons of Carruthers J. and confirmed at p. 131 [61 O.R. (2d)] that:

> *the lien created by s. 15 of the Employment Standards Act attached to the after-acquired property of Admiral immediately upon its acquisition, and as a consequence the banks' charge under s. 178 extended only to the after-acquired property of Admiral not covered by the lien.* (emphasis added)

102 On the issue of termination and severance payments, the Court of Appeal concurred with the result reached by Carruthers J. that Coopers and Lybrand were not legally responsible for payment of termination and severance pay. The Court concluded that termination and severance payments are not "wages, salaries or other remuneration owing in respect of the period of three months next preceding the making of such order or assignment" pursuant to s. 178(6) of the *Bank Act*. The Court concurred with the reasoning of Carruthers J. that Coopers and Lybrand were not successor employers and that s. 13 of the *Employment Standards Act* had no application to the facts of the case.

***Analysis of the Hall Decision Followed by a Discussion of Whether Hall Implicitly Overrules Armstrong***

103 In assessing the impact, if any, of *Hall* upon the *Armstrong* decision, it is necessary to focus on the facts of *Hall* and understand the three constitutional questions posed to the Supreme Court of Canada.

104 In *Hall*, the respondent, a Saskatchewan farmer, had granted mortgages in favour of the appellant bank. As well, the bank held a security interest in equipment pursuant to s. 88 (the predecessor section to s. 178) of the *Bank Act*. The bank seized the equipment pursuant to the *Bank Act* and moved to enforce its security rights under the mortgage. By way of defence, the respondent stated that the bank was in breach of the notice requirements of the provincial *Limitation of Civil Rights Act*, and sought to have the foreclosure proceedings dismissed and the bank's security declared null and void in accordance with the provisions of the provincial legislation.

105 The provincial legislation required notice of intention to seize to be served prior to steps being taken to realize on bank security, and required the Courts to supervise any sale. In case of default of the notice requirement, the provincial legislation purported to render the *Bank Act* security null and void and unenforceable. The provincial legislation provided a further draconian requirement. If the *Bank Act* security was declared null and void, then the bank became obliged to repay the debtor all amounts paid from the date the bank security was granted.

106 The chambers judge found that the provincial legislature did not have authority to enact the legislation which had the effect of negating a federally created security agreement, even if the provincial legislation was held to be competent to limit the manner in which it could be enforced.

107 The majority of the Saskatchewan Court of Appeal disagreed with the findings of the chambers judge. They were of the opinion that the provincial legislation did not affect the debtor's indebtedness or liability to pay, but merely imposed notice obligations upon the bank and provided a procedure for enforcement.

108 The three constitutional questions posed to the Supreme Court of Canada in *Hall* were [p. 130]:

> 1. Are ss. 19 to 36 of *The Limitations of Civil Rights Act*, R.S.S. 1978, c. L-16, *ultra vires* the Legislature of Saskatchewan in whole or in part?
>
> 2. Are ss. 178 and 179 of the *Banks and Banking Law Revision Act*, 1980, S.C. 1980-81-82-83, c. 40, *ultra vires* the Parliament of Canada in whole or in part?
>
> 3. Do ss. 178 and 179 of the *Banks and Banking Law Revision Act*, 1980, S.C. 1980-81-82-83, c. 40, conflict with ss. 19 to 36 of *The Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16, so as to

render inoperative ss.19 to 36 in respect of security taken pursuant to s. 178 by a chartered bank?

109 The first issue was dealt with summarily. It was found that, absent issues of conflict with the federal legislation, the provincial legislation was intra vires and within the ambit of the provincial powers of property and civil rights.

110 The defendants place great weight upon the analysis of La Forest J. of the second and third issues in support of their argument that *Hall* has implicitly overruled *Armstrong*. They raise the following questions.

111 1. Does Justice La Forest's historical analysis of the *Bank Act*, endorsing a uniform and nationwide security mechanism free from provincial lending regimes, mean that *Bank Act* security will have priority over competing provincial trusts or liens?

112 2. Paramountcy must be considered in the context of the federal legislative purpose. Does recognition of subsequent provincial trusts and liens frustrate the enunciated test of the federal legislative purpose of the *Bank Act*?

113 3. The *Bank Act* constitutes a complete code defining and providing for the realization of *Bank Act* security. Does this mean the priorities created under provincial legislation will not be recognized when competing with *Bank Act* security?

***Issue 2 in Hall -- Are Sections 178 and 179 of Bank Act Ultra Vires***

114 The constitutional challenge in *Hall* is enunciated by La Forest J. as follows at p. 144:

> As I noted earlier, the basis of the respondent's challenge to the constitutionality of ss. 178 and 179 [of the *Bank Act*] is founded on the proposition that the federal banking power cannot extend to allowing Parliament to define the procedures for realization and enforcement of a federal security interest.

115 La Forest J. elaborates on the historical background and the cases supporting the view that there is a need for a convenient and consistent national banking system, which is in the interests of both manufacturers and banks. He states at p. 146:

> As we saw earlier, the creation of this security interest was predicated on the pressing need to provide, on a nationwide basis, for a uniform security mechanism so as to facilitate access to capital by producers of primary resources and manufacturers. Such a security interest, precisely because it freed borrower and lender from the obligation to defer to a variety of provincial lending regimes, facilitated the ability of banks to realize on their collateral. This in turn translated into important benefits for the borrower: lending became less complicated and more affordable.

116 Notwithstanding the need for a national banking system, La Forest J. recognizes that in Canadian federation, provincial and federal jurisdictions are not capable of division into discrete watertight compartments. La Forest J. states at pp. 145-146:

> Thus it is clear that *there can be no hermetic division between banking as a generic activity and the domain covered by property and civil rights. A spillover effect in the operation of banking legislation on*

> *the general law of the provinces is inevitable.* Viscount Simon makes this very point in his judgment in *Attorney-General for Alberta v. Attorney-General for Canada, supra*, at p. 517. The fact that a given aspect of federal banking legislation cannot operate without having an impact on property and civil rights in the provinces cannot ground a conclusion that that legislation is *ultra vires* as interfering with provincial law where the matter concerned constitutes an integral element of federal legislative competence; see *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754, at pp. 768-69, per Beetz J. (emphasis added)

117 La Forest J. concludes at p. 147 that rights to enforce bank security are not mere appendages to the legislation, but rather, "must be viewed as the very linchpin of the security interest that Parliament, in its wisdom, has created. Far from being incidental, these provisions are integral to, and inseparable from, the legislative scheme". La Forest J., therefore, concludes that the manner of enforcement of *Bank Act* security pursuant to s. 178 is integral to the exercise of federal jurisdiction in the field of banking.

118 After reaching his conclusion that the federal legislation is intra vires, La Forest J. elaborates that, contrary to the view expressed by the majority of the Saskatchewan Court of Appeal, his finding is in no way undermined by the decision of the Supreme Court of Canada in *Royal Bank v. Nova Scotia (Workmen's Compensation Board)*, [1936] S.C.R. 560 ("*Royal Bank v. Workmen's Compensation*"). This finding of La Forest J. is an important one in assessing whether *Hall* implicitly overrules *Armstrong*.

119 *Royal Bank v. Workmen's Compensation* recognized a provincial statutory lien as having priority over the Royal Bank's prior *Bank Act* security. The issue in *Royal Bank v. Workmen's Compensation* is, in my view, very close to the issue in this case.

120 La Forest J., at p. 148, cites with approval an excerpt of Davis J. from *Royal Bank v. Workmen's Compensation* as follows:

> ... I have reached the conclusion that the goods in question, though owned by the bank subject to all the statutory rights and duties attached to the security, were property in the province of Nova Scotia
>
> > used in or in connection with or produced in or by the industry with respect to which the employer (was) assessed though not owed by the employer
>
> and became subject to the lien of the provincial statute the same as the goods of other owners ... *It is a provincial measure of general application for the benefit of workmen employed in industry in the province and is not aimed at any impairment of bank securities though its operations may incidentally in certain cases have that effect.* (emphasis added)

He confirms at p. 147 that the case "simply settled that, in applying a provincial tax on property, a bank, as a property owner in respect of property assigned to it by operation of the *Bank Act* security, *must be treated like any other property owner*" (emphasis added). *Bank Act* security serves to vest "in the bank all the right and title to goods, wares and merchandise covered by the holder or owner thereof" (p. 133).

121 I therefore find that La Forest J.'s historical analysis of the importance of consistent nationwide security does not mean that *Bank Act* security will necessarily have priority over competing provincial trusts or liens.

***Issue 3 in Hall -- The Paramountcy Analysis***

122 La Forest J. then considers issues of operational conflict and paramountcy. In considering paramountcy, he enunciates two principles upon which the defendants place emphasis. Firstly, the paramountcy test must be considered in the context of the intended legislative purpose. Secondly, the *Bank Act* constitutes a complete code for the definition and realization upon *Bank Act* security. In the view of the defendants, an extension of these principles to the facts of this case results in the plaintiffs' priority being defeated.

123 In considering the test for duplicative provincial legislation, La Forest J. cites with approval, at p. 151, the often quoted passage of Dickson J. (as he then was) in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 ("*Multiple Access*") at p. 191:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

Paramountcy, therefore, is invoked when "it is impossible to comply with both legislative enactments" (p. 151).

124 La Forest J. goes on to cite with approval the principle that duplicative federal and provincial legislation may represent, in the words of Professor Lederman, the "ultimate in harmony" in a federal system. He outlines the principle giving rise to the test for paramountcy being an "actual conflict in operation" between federal and provincial legislation. The following excerpt from Dickson J.'s judgment in *Multiple Access* at p. 151 of La Forest J.'s reasons elaborates upon this important principle:

> *[T]here is no true repugnancy in the case of merely duplicative provisions since it does not matter which statute is applied; the legislative purpose of Parliament will be fulfilled regardless of which statute is invoked by a remedy-seeker; application of the provincial law does not displace the legislative purpose of Parliament.* (emphasis added.)

125 La Forest J. finds in *Hall*, however, that there is an actual conflict in operation between the *Bank Act* and *The Limitation of Civil Rights Act*. He states at p. 153: "There could be no clearer instance of a case where compliance with the federal statute necessarily entails defiance of its provincial counterpart."

***Federal Legislative Purpose***

126 La Forest J. interprets the paramountcy test with regard to the federal legislative purpose.

127 The view of the majority of the Saskatchewan Court of Appeal that the effect of the provincial legislation was merely to delay enforcement of the banks' rights was resoundingly rejected by La Forest J. The legislative purpose of the *Bank Act* must be considered as follows as stated by La Forest J. at p. 154:

> In this instance, as I have already noted, Parliament's legislative purpose in defining the unique security interest created by ss. 178 and 179 of the *Bank Act* was manifestly that of creating a security interest susceptible of uniform enforcement by the banks nationwide, that is to say a lending regime *sui generis* in which, to borrow the phrase of Muldoon J. in *Canadian Imperial Bank of Commerce v. R., supra*, at

> p. 159, the "bank obtains and may assert its right to the goods and their proceeds against the world, *except as only Parliament itself may reduce or modify those rights*" (emphasis added). This, of course, is merely another way of saying that Parliament, in its wisdom, wished to guard against creating a lending regime whereby the rights of the banks would be made to depend solely on provincial legislation governing the realization and enforcement of security interests.

128 At p. 155 of his reasons, La Forest J. adds the requirement that paramountcy must be interpreted in light of the legislative purpose:

> *The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose.* Absent this compatibility, dual compliance is impossible. Such is the case here. The two statutes differ to such a degree in the approach taken to the problem of realization that the provincial cannot substitute for the federal. (emphasis added.)

Does recognition of subsequent provincial trusts and liens frustrate the enunciated federal legislative purpose of the *Bank Act*?

129 The statements of La Forest J. respecting the federal legislative purpose of the *Bank Act* must, in my view, be considered in light of the test of paramountcy. La Forest J. acknowledges that duplicative federal and provincial legislation may represent the "ultimate in harmony" in a federal system. He recognizes the balance implicit in the dual nature of Canadian federalism. The legislation in *Hall* was not duplicative legislation capable of co-existence, but rather a clear example of operational conflict. The inability of the two pieces of legislation in *Hall* to co-exist was obvious and jarring.

130 The statement of legislative purpose deals primarily with enforcement and realization of *Bank Act* security as well as the definition of the security. It does not purport to deal with competing priorities. In my view, the defendants' invitation to read this exten sion into the statement of legislative purpose is not consistent with the earlier position of La Forest J. which confirms the viability of the *Royal Bank v. Workmen's Compensation* decision. Implicitly, he acknowledges the principle that *Bank Act* ownership is qualified and that the bank cannot have rights higher than or different from that of an owner when he refers to *Royal Bank v. Workmen's Compensation*. I therefore find that the statements of La Forest J. outlining the legislative purpose of the *Bank Act* are not frustrated by the recognition of provincial statutory trusts or liens which may have priority over *Bank Act* security.

***Complete Code***

131 La Forest J. then considers the issue from the perspective of operational conflict, and introduces the principle that the *Bank Act* forms a complete code. The defendants place emphasis on this principle. La Forest J. states that the *Bank Act* forms a complete code that both defines and provides for the realization of *Bank Act* security interests. He states at p. 155: "There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation."

132 La Forest J. finds that the definition of *Bank Act* security interest and the realization procedure must be regarded as a "single whole". In light of this finding and his test of legislative purpose, he finds, not surprisingly,

that the *Bank Act* fully occupies a field in the regime of realization of *Bank Act* security. As there is clear operational conflict between the provincial and federal legislation, the duplicative paramountcy analysis may, in the view of La Forest J., have been unnecessary.

133 On either constitutional analysis, La Forest J. therefore finds that the respondents' claim in *Hall* fails. Firstly, it fails the test of paramountcy; this is a case of duplicative provincial and federal legislation, and there is clear operational conflict. Secondly, it fails because the federal field, which constitutes a complete code, is fully occupied and the provincial legislation is in conflict with that code.

134 Do La Forest J.'s statements in *Hall* about a complete code mean that provincial legislation may not rank in priority to *Bank Act* security? I think not. The qualified nature of *Bank Act* security is not altered in *Hall* as is made explicit by La Forest J. when he confirms, at p. 147, *Royal Bank v. Workmen's Compensation* and the principle that the bank "must be treated like any other property owner." A complete code defining and providing a mechanism for realization does not imply that provincial priorities are defeated.

135 Accordingly, I find that La Forest J.'s finding that the *Bank Act* constitutes a complete code does not prevent valid provincial legislation from creating enforceable interests and priorities, which may rank in priority to *Bank Act* security.

136 The facts and issues in *Hall* are very different from this case. Caution must be utilized in applying legal principles enunciated in a specific context and applying them broadly to radically different facts and issues.

137 I therefore conclude that the assertions put forward by the defendants, considered either individually or cumulatively, do not support the proposition that *Hall* implicitly overruled *Armstrong*. I am reinforced in my conclusion by the Ontario Court of Appeal decision in *Bank of Nova Scotia v. International Harvester Credit Corp.* (1990), 74 O.R. (2d) 738 (C.A.) ("*IHCC*"). *IHCC* was decided after *Hall*. Houlden J.A. refers to *Hall* in his reasons and adopts at pp. 753-754 the description of *Bank Act* security enunciated by La Forest J. in *Hall*. *IHCC* recognized the priority of a conditional vendor's interest over a *Bank Act* s. 178 interest even though the security interest of the vendor was unperfected under the PPSA when the *Bank Act* security was given.

***Did Carruthers J. rely on decisions in Armstrong that were overruled by the Supreme Court of Canada, thereby undermining the legal basis of the decision?***

138 Much emphasis was placed by the defendants upon the fact that Carruthers J. relied upon decisions that have been subsequently overruled by the Supreme Court of Canada. The conclusion I am invited to make is that the legal ratio underlying Carruthers J.'s decision has been overruled. Those decisions are *Re Dairy Maid Chocolates Ltd.* (1972), 17 C.B.R. (N.S.) 270 (Ont. S.C.) ("*Dairy Maid Chocolates*") and *Phoenix Paper*. It is important to note that these decisions were not overruled by *Hall* but rather by *Henfrey Samson*.

139 The distinctions between *Hall* and *Henfrey Samson* are obvious and important. *Hall*, like *Armstrong*, deals with the priorities of the parties' rights under the *Bank Act*. *Henfrey Samson* interprets rights and priorities in the context of bankruptcy. What is the effect of *Henfrey Samson* overruling the line of authorities culminating in *Phoenix Paper*, in the context of bankruptcy, when we consider the *Armstrong* case and the issues relating to the *Bank Act*?

# TAB 6

**COURT FILE NO.:** 03-CL-5145
**DATE:** 20050718

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**(COMMERCIAL LIST)**



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|---|---|
| IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED<br><br>AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A" | *Andrew J. Hatnay*, Ontario Agent for the Quebec Pension Committee of Ivaco Inc.<br><br>*Fred Myers* and *Susan Rowland*, for the Superintendent of Financial Services<br><br>*Geoff R. Hall*, for QIT-Fer et Titane Inc.<br><br>*Jeffrey S. Leon*, *Sheryl E. Seigel* and *Richard B. Swan*, for National Bank of Canada<br><br>*Daniel V. MacDonald*, for the Bank of Nova Scotia<br><br>*Robert W. Staley*, *Kevin J. Zych* and *Evangelia Kriaris*, for the Informal Committee of Noteholders<br><br>*Stephanie Fraser*, for Pension Benefit Guaranty Company<br><br>*Peter F.C. Howard* and *Ashley John Taylor*, for Ernst & Young Inc., the Court-Appointed Monitor<br><br>**HEARD:** June 13-15, 2005 |

**FARLEY J.**

[1] As argued, the Superintendent of Financial Services (Ontario) moved as follows. Paragraphs 1 and 87 of the Superintendent's factum stated:

> 1. The Superintendent of Financial Services ("Superintendent") brings this motion for an Order directing the Monitor to distribute part of the proceeds of sale of the businesses of Ivaco Inc. ("Ivaco") and certain of its subsidiaries to four non-union pension plans in order to protect the

interests of a vulnerable group of persons – the pension beneficiaries. Alternatively, the Superintendent seeks an Order that an amount sufficient to satisfy the claims in respect of the non-union pension plans be held in segregated trust accounts for the benefit of the pension beneficiaries pending the payment of the claims.

87. For the foregoing reasons, the Superintendent respectfully requests that this Honourable Court make an order

(a) directing the Monitor to pay into the Non-Union Plans the amounts owing in respect of the unpaid contributions and the Companies' wind-up liabilities;

(b) alternatively, to the extent that any amount claimed by the Superintendent is not paid under paragraph (a), an order directing the Monitor to segregate into a separate trust sufficient funds to pay such claim;

(c) in the further alternative, to the extent that any amounts in (a) or (b) are not paid or segregated, to delay the granting of a bankruptcy order until all pension liabilities of the Companies are finally determined and paid.

[2] The Superintendent's factum also stated at para. 2:

2. Ivaco, Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc. ("Ifastgroupe") and Docap (1985) Corporation ("Docap") (being four of the Applicants, and collectively, the "Companies") had established various registered pension plans for their employees in Ontario. Under the provisions of the *Pension Benefits Act*, the Companies were required to make contributions to pension plans on a monthly basis, and under the terms of the Initial Order granted in these proceedings, the Applicants were entitled to make such contributions. However, the Companies claimed that unless they suspended payment of certain pension contributions, they would not have sufficient cash to continue operations until a sale of the Applicants' business could be concluded. On this basis, they obtained an order of this Honourable Court to permit them to suspend payments of certain pension contributions that became due after the Initial Order. Thus, apart from the DIP lender, which has been repaid in full out of the sale proceeds, the pensioners were the only creditors who provided a source of financing to the applicants so that a going concern sale could be concluded.

With respect, it would appear to me that the last sentence of para. 2 somewhat overstates the situation. What was suspended by the November 28, 2003 order (which was not opposed by any interested party, including salaried employees, salaried pensioners or pension regulators or overseers including the Superintendent – and as to which no one has utilized the come-back provisions, certainly on any timely basis or on any direct basis) was that the Ivaco Companies would not have to pay any past service contributions for any of the 16 affected pension plans including the four Salaried (i.e. Non-Union) Plans which were not assumed by the purchaser in the Heico sale transaction which closed as of December 1, 2004.

[3] The November 28, 2003 order provided:

**Pension Payments**

3. THIS COURT ORDERS that notwithstanding any other provision of the Amended and Restated Order, the Applicants and Partnerships (as defined in the Amended and Restated Order) shall not make any past service contributions or special payments to funded pension plans maintained by an Applicant or Partnership (the "Pension Plans") during the Stay Period, pending further Order of this Court.

4. THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

5. THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated Order.

6. Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

Even if the "priorities are reversed" with a bankruptcy, this does not affect paragraph 6 of the Order; the claims would be unsecured, not extinguished or compromised.

[4] The overstatement would appear to me to be that other stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due. On the other hand, notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a "fresh" obligation.

[5] Current pension obligation payments continued to be paid throughout the period subsequent to the November 28, 2003 order.

[6] While originally initiated as a restructuring CCAA proceeding with a filing under the CCAA on September 16, 2003, the emphasis rather soon thereafter functionally became a two track exercise, namely either a restructuring or a sale (and in the latter case it was hoped that it would be a sale as a going concern rather than a piecemeal liquidation).

[7] The Heico deal was a sale as a going concern with the purchaser assuming the unionized worker pension plans (but not the Salaried Plans) and with all workers (unionized and non-unionized) being taken on except for 5 non-unionized workers (one active and 4 inactive). In the periods (i) September 16, 2003 to November 28, 2003 and (ii) then to December 1, 2004, all unionized and non-unionized workers continued to be paid their wages and pensioners continued to be paid their pensions at full entitlement rates.

[8] It does not appear to be disputed that the Heico deal on a going concern basis maximized the value of the enterprise both for the creditors and, with the assumption of the unionized workers and virtually all non-unionized workers plus the assumption of the unionized worker pension plans, for the workers. It is unfortunate, but a realistic fact of life in these circumstances that the Salaried Plans were not assumed; the deficit in the Salaried Plans now being estimated at approximately $23 million which, according to present actuarial assumptions, may impact those pensions by 20% to 50%, according to the Pension Committee of Ivaco Inc.; however, the Superintendent's submissions were that the past contributions recovery would result in a pension reduction of 17% (and without recovery of the past contributions, the reduction would be 26%), notwithstanding the approximately $11 million increase in the Salaried Plans during the 14½ month period to December 1, 2004. Part of this deficiency will be picked up by the Ontario Pension Benefits Guarantee Fund ("PBGF") (recognizing that not all of the Salaried Plan beneficiaries are covered by the Ontario legislation). The PBGF payment would entitle the Superintendent to a subrogated charge against any then existing assets of the Ivaco Companies.

[9] The Ivaco Companies are still involved in the CCAA proceedings. It cannot be reasonably disputed that it is not reasonably possible for the Ivaco Companies to be restructured. In pith and substance what has happened is that there has been a liquidating CCAA proceeding.

[10] The National Bank, the Bank of Nova Scotia, the Informal Committee of Noteholders, and a very major trade creditor, QIT - Fer et Titane Inc., wish to have the proceedings transformed into BIA proceedings. It would not appear to me that there has been any conduct alleged to have been taken by any of these BIA desirous parties which would be considered "inequitable" in the sense of *Bulut* v. *Brampton (City)* (2000), 48 O.R. (3d) 108 (C.A.); *Re Christian Brothers of Ireland* (2004), 69 O.R. (3d) 507 (S.C.J.). See also *Unisource Canada Inc. (cob Barber-Ellis Fine Papers)* v. *Hong Kong Bank of Canada* (1998), 43 B.L.R. (2d) 226 (Ont. Gen. Div.), affirmed (2000), 15 P.P.S.A.C. (2d) 95 (Ont. C.A.); *AEVO Co.* v. *D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Gen. Div.).

[11] While in a non-bankruptcy situation, the Ivaco Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries by s. 57(3) of the *Pension Benefits Act* (Ontario), in a bankruptcy situation, the priority of such a statutory deemed trust ceases unless there is in fact a "true trust" in which the three certainties of trust law are found to exist, namely (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of object. For these three certainties to be met, the trust funds must be segregated from the debtor's general funds. See *British Columbia* v. *Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726 (S.C.C.); *British Columbia* v. *National Bank* (1994), 119 D.L.R. (4th) 669 (B.C.C.A.); *Bassano Growers Ltd.* v. *Price Waterhouse Inc.* (1998), 6 C.B.R. (4th) 199 (Alta. C.A.); *Re IBL Industries Ltd.* (1991), 2 O.R. (3d) 140 (Gen. Div.); *Continental Casualty Co.* v. *Macleod-Stedman Inc.* (1996), 141 D.L.R. (4th), 36 (Man. C.A.). There is no evidence that any of the "required" funds have been segregated or earmarked for the pension beneficiaries; nor did the Superintendent make such a request as a condition of the Heico deal being closed. Since there has been no such segregation, the deemed statutory trusts would not be effective as trusts upon the happening of a bankruptcy: see *Henfrey* at p. 141.

[12] An administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy. Section 2(1) of the BIA provides that a "secured creditor" includes a person who holds a lien (i.e. a "true lien") on a debt which is actually owing. Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA "lien": see *New Brunswick* v. *Peat Marwick Thorne Inc.* (1995), 37 C.B.R. (3d) 268 (N.B.C.A.). While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred s. 136(1) of the BIA determines the status and priority of claims: see *Deloitte, Haskins & Sells Ltd.* v. *Alberta (Workers' Compensation Board)* (1985), 19 D.L.R. (4th) 577 (S.C.C.); *Husky Oil Operations Ltd.* v. *Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.).

[13] The Superintendent relies on my earlier decision of *Toronto-Dominion Bank* v. *Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). However this case is distinguishable in that while there was a bankruptcy petition outstanding at the time of the motion, no one was pressing it forward. The petitioner had died and the bank as the major creditor of Usarco only wished to proceed with a bankruptcy once the property was sold (which property had environmental problems of a significant nature). I indicated at pp. 2 and 4:

> While it is possible for the bank to be substituted or added as a petitioner in the Gold bankruptcy petition ... it has not moved to do so. It is now approximately a year and a half since the Gold Petition. The bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view, it would be inappropriate for the bank to put all proceedings involving Usarco (including this motion by the administrator) into suspended animation while the bank determined if, as, and when it wished to take action.

Rather in the present case with the Ivaco Companies there are major creditors who wish to proceed forthwith – and for the reason that such a bankruptcy will enhance their position (i.e. the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims). See also *Usarco* at p. 5 where I observed:

> One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy.

See also *Re Black Brothers (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163 (B.C.S.C.); *Bank of Montreal* v. *Scott Road Enterprises Limited* (1989), 73 C.B.R. 273 (B.C.C.A.); *Re Beverley Bedding Corporation* (1982), 40 C.B.R. (N.S.) 95 (Ont. S.C.); *Re Harrop of Milton Inc.* (1979), 22 O.R. (2d) 245 (Ont. S.C.). Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.). A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why the order ought not to be granted. While in the present case, the Ivaco Companies as debtors have not objected to the proposed bankruptcy proceedings, they are not functionally in a position to do so as they are rudderless in this respect (the officers and directors have abandoned ship by resigning some months ago and the Monitor's increased powers not extending to this – see the order of December 17, 2004, which in respect of anything which may be considered touching the pension plan issues, only relates to, in effect a safekeeping of the Heico sale proceeds and other assets of the Ivaco Companies). However for the purposes of this motion, I think it fair to treat the Superintendent as the "champion" of the Ivaco Companies' interests in this issue in a surrogate capacity.

[14] Allow me to observe that the usual situation of invoking a s. 43(7) discretion is where (i) the petitioner has an ulterior motive in pursuing the petition (such as eliminating a competitor or inflicting harm on the debtor (together with its officers, directors, shareholders and/or other creditors) as a revenge tool) or (ii) there is no meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. What the Superintendent has submitted in opposition to the request to proceed in bankruptcy mode is not of this nature. Nor is

this type of situation of the nature envisaged at para. 12 of *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C.S.C.) at p. 241 where Tysoe J. stated:

> 12. Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

There is no such reorganization possible under the existing circumstances. Rather the compromise of claims may be adequately effected under the BIA regime (as opposed to the submission of the Superintendent to appoint an interim receiver to operate under the CCAA proceedings). It would seem to me that those claims which have already been resolved under the CCAA proceeding could be "transferred" as resolved claims into a BIA proceeding.

[15] The Superintendent has not paid out any amount under the PBGF and thus has not effected nor perfected its status as a subrogee.

[16] Given the limited role of the Monitor as indicated above I do not see that the Monitor in fact, law and fairness can be considered a fiduciary to the pension beneficiaries in the nature of an administrator of the Salaried Plans.

[17] Pursuant to s. 57(3) and (4) of the *Pension Benefits Act*, what is the responsibility? It is that the employer (the Ivaco Companies) be deemed to hold the pension funding monies in trust for the pension beneficiaries. However there is no provision in that legislation that the monies be paid out to the pension plan at any particular time. As discussed above, those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The BIA does not contain any provision that the priority position is maintained in a bankruptcy; rather the case law is to the contrary: see *Henfrey* at p. 741; *Bassano* at pp. 201-202; *IBL* at pp. 143-4.

[18] In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed (and un-reconsidered) order of November 28, 2003, the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

[19] However, to allow sufficient time for consideration of appeal, no action or step is to be taken with respect to dealing with the bankruptcy for at least 60 days from the release of these

reasons. Of course it will be within the context of those bankruptcy proceedings that priorities will be determined if there is a bankruptcy, keeping in mind that s. 43(7) of the BIA may be raised at the hearing of the petition.

[20] While the Superintendent in effect griped about the machinations concerning certain "corporate" actions or steps to be taken concerning the Ivaco Companies to "prepare" them for a bankruptcy proceeding, I do not find that these mechanical steps as outlined in paragraphs 2-5 of the National Bank motion as being improper – but rather that these mechanical steps merely recognize the exposure and experience of the Superior Court of Justice (Ontario) to this situation. I have the similar view as to paragraphs 7-8. However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

[21] With respect to the Pension Committee of Ivaco Inc.'s motion to transfer the issue of whether the Ivaco Companies are obliged on a solidary basis for the obligations of each other for amounts owing to the Salaried Plan pursuant to s. 11 of the *Supplemental Pension Plans Act* (Quebec), I have the following observations. I do not rule out the possibility of requesting the Quebec Superior Court to determine this issue. However I do not find it necessary or desirable to make that decision at the present time. It would make sense to do so once it has been determined whether the Ivaco Companies are bankrupt or not (in the latter case one would conclude that likely the CCAA proceedings would be supplemented by an interim receivership) as different factors may come into functional play depending on that outcome.

[22] In the interim, I would note the following. Canadian courts have a good deal of experience in dealing with foreign law on a proven basis. There is an issue of extraterritorial application of the SPPA. When provincial legislation purports to have an extraterritorial effect, the courts of the enacting province do not have exclusive jurisdiction to determine the constitutional validity or scope of the legislation: see J. Walker, ed., *Castel & Walker: Canadian Conflict of Laws*, 6th ed., Vol. 1 (Toronto: Butterworths, 2005) at 2:7.

[23] This constitutional question would appear to arise incidentally to the ordinary course of these proceedings here in Ontario over which this Court has properly assumed jurisdiction – and such jurisdiction has not been challenged since the start of these proceedings on September 16, 2003. See *Hunt* v. *T&N plc*, [1993] 4 S.C.R. 289 where La Forest J. observed at pp. 308-10:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a

foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation. The distinction is clearly made by Lord Diplock in *Buck*, at pp. 886-87:

> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction.

Similarly in *Manuel v. Attorney General*, [1982] 3 All E.R. 786 (Ch. D.), while it was asserted that the courts of one country should not pronounce on the validity of a statute of another, the case where the question arises merely incidentally is expressly excepted.

The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. Formal determination of constitutionality is often purely fortuitous. It is often dependent on there happening to be parties interested in challenging the statute. This is unlikely to happen where, as in this case, most of the parties affected are outside the enacting jurisdiction. In this case, the Quebec statute has never been challenged by Quebec litigants because it does not arise in normal litigation in the province, and in extraprovincial litigation. Quebec defendants benefit while Quebec plaintiffs are normally unaffected. Why should a litigant not be able to argue constitutionality in the course of litigation that directly raises the issue? As a practical matter, it is not much more difficult to determine constitutionality than any other aspect of foreign law.

He went on to state at pp. 314-15:

> It may, no doubt, be advanced that courts in the province that enacts legislation have more familiarity with statutes of that province. It must not be forgotten, however, that courts are routinely called to apply foreign law in appropriate cases. It is thus only the fact that a constitutional issue is raised

> that differentiates this case. But all judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution. In a judicial system consisting of neutral arbiters trained in principles of a federal state and required to exercise comity, the general notion that the process is unfair simply is not legally sustainable, all the more so when the process is subject to the supervisory jurisdiction of this Court.
>
> This approach is even more persuasive where, as here, the issue relates to the constitutionality of the legislation of a province that has extraprovincial effects in another province. That is especially true where the constitutionality of the other province's legislation has never been challenged in the other province's courts, and where moreover, as here, such a challenge is unlikely. Where the violation is as much a violation against the Constitution of Canada, then the superior courts which must legitimately face the issue should be able to deal with the question. Against this position, it was observed that most of the parties interested in the question as interveners would be in the province whose statute is impugned. That may be, but where the alleged violation relates to extraterritorial effect, many of the interested parties are also outside Quebec. Above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction.

[24] The Ivaco Companies initiated the CCAA proceedings in Ontario; no party has questioned the appropriateness of their so doing. Under these circumstances one would have to consider that there should be an onus on the Pension Committee to demonstrate that Quebec is clearly the more appropriate forum on all aspects of the issue as framed. See *ABN Amro Bank et al.* v. *BCE Inc. et al.* (April 30, 2003) (Ont. S.C.J.) a decision of mine at para. 26. This motion is dismissed.

[25] Orders accordingly.

J.M. Farley

**Released:** July 18, 2005

**COURT FILE NO.:** 03-CL-5145
**DATE:** 20050718



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

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**REASONS FOR JUDGMENT**

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FARLEY J.

**Released:** July 18, 2005

# TAB 7

42 E.T.R. 235

1991 CarswellOnt 540

Toronto Dominion Bank v. **Usarco** Ltd.

**Re USARCO LIMITED** PENSION PLAN FOR ITS HOURLY EMPLOYEES; TORONTO-DOMINION BANK v. **USARCO LIMITED** and FRANK LEVY

Ontario Court of Justice (General Division)

Farley J.

Heard: June 4 and 17, 1991
Judgment: August 2, 1991
Docket: Doc. 52384/90



Counsel: Harry Underwood, for administrator.

M. MacNaughton, for Toronto-Dominion Bank.

N. Saxe, for receivers.

Subject: Estates and Trusts; Corporate and Commercial; Property; Insolvency

Bankruptcy --- Property of bankrupt -- Trust property -- General.

Pensions --- Surplus funds -- Bankruptcy of employer.

Bankruptcy -- Property of bankrupt -- Trust property -- Interaction of Bankruptcy Act and Pension Benefits Act, 1987 -- Bankruptcy petition filed but not proceeded with -- Claims of administrator of pension plan of bankrupt company having priority over claims of trustee in bankruptcy -- Bankruptcy Act, R.S.C. 1985, c. B-3 -- Pension Benefits Act, 1987, S.O. 1987, c. 35.

Pensions -- Interaction of Pension Benefits Act, 1987 and Bankruptcy Act -- Bankruptcy petition filed but not proceeded with -- Claims of administrator of pension plan of bankrupt company having priority over claims of trustee in bankruptcy -- Bankruptcy Act, R.S.C. 1985, c. B-3 -- Pension Benefits Act, 1987, S.O. 1987, c. 35.

Pensions -- Deemed trust under s. 58 of Pension Benefits Act, 1987 -- Employer company wound up -- Deemed trust to include moneys accrued but not yet due from employer to plan, and interest payable by employer on unpaid amounts -- Pension

Benefits Act, 1987, S.O. 1987, c. 35, ss. 58(4), 59(2).

The defendant company, a scrap metal dealer and processor, ceased operations on July 13, 1990. A bankruptcy petition had been filed against the company on January 5, 1990, but had not been proceeded with. The plaintiff bank was the defendant company's largest creditor, being owed some $18 million, secured by a general security agreement registered under the Personal Property Security Act, 1989 (Ont.).

The defendant company had an employee pension plan which at the wind-up date was unfunded to the extent of approximately $600,000. The administrator of the pension plan informed the company late in 1990 that all the company's assets were subject to a lien in favour of the administrator, on behalf of the employee beneficiaries of the plan, in the amount of the deemed trust under s. 58 of the Pension Benefits Act, 1987, and that this amount was to include interest on moneys that were due from the company but were unpaid under the plan. It was further claimed that by virtue of s. 67(a) of the Bankruptcy Act any payment received by the administrator from the company would not be part of the assets subject to the bankruptcy should the petition be proceeded with in the future.

The administrator moved to have the amounts it claimed paid to it on behalf of the plan, and the plaintiff bank moved to stay the administrator's motion.

Held:

The administrator's motion was granted, and the bank's motion was dismissed.

Since the bankruptcy petition had not been proceeded with, the security interest of the bank was subordinate to the interest of the beneficiaries of the deemed trust. According to s. 67(a) of the Bankruptcy Act, such trust property was not the property of a bankrupt, divisible among its creditors.

Furthermore, by virtue of s. 58(4) of the Pension Benefits Act, 1987, the deemed trust, in a wind-up situation, included any contributions to the plan which had accrued but were not yet due under the plan. Therefore, in the present circumstances, the deemed trust extended to the amount necessary for the defendant company to fully fund its pension obligation as of the wind-up date.

Pursuant to s. 59(2) of the Pension Benefits Act, 1987, interest was to be paid by the employer on contributions to the plan that remained unpaid. Therefore, the amount payable to the administrator was to include such interest.

Cases considered:

Black Brothers (1978) Ltd., Re (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.) -- referred to

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, 34 E.T.R. 1, 75 C.B.R. (N.S.) 1, 38 B.C.L.R. (2d) 145, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164 -- considered

Develox Industries Ltd. (No. 3), Re (1970), 15 C.B.R. (N.S.) 18 (Ont. S.C.) -- referred to

Hillstead Ltd., Re (1979), 26 O.R. (2d) 289, 32 C.B.R. (N.S.) 55, 9 B.L.R. 74, 1 P.P.S.A.C. 136, 103 D.L.R. (3d) 347 (S.C.) -- considered

I.B.L. Industries Ltd., Re (1991), 4 C.B.R. (3d) 301, 76 D.L.R. (4th) 439, 2 O.R. (3d) 140 (Bktcy.) -- applied

McLean Co. v. Newton, 8 C.B.R. 61, [1926] 3 W.W.R. 593, 36 Man. R. 187, (sub nom. Bortoluzzi v. Kaplan) [1927] 1 D.L.R. 183 (C.A.) -- referred to

Ontario Hydro-Electric Power Commission v. Albright (1922), 64 S.C.R. 306, [1923] 2 D.L.R. 578 [leave to appeal to Privy Council refused (1922), [1923] A.C. 167, [1923] 2 D.L.R. 599 (P.C.)] -- followed

Price Waterhouse Ltd. v. Marathon Realty Co., [1979] 6 W.W.R. 382, 32 C.B.R. (N.S.) 71, 103 D.L.R. (3d) 699 (Man. Q.B.) -- referred to

Sara, Re (1985), 56 C.B.R. (N.S.) 282 (Ont. S.C.) [supplementary reasons at (1985), 57 C.B.R. (N.S.) 185 (Ont. S.C.)] -- referred to

Southern Fried Foods Ltd., Re (1976), 12 O.R. (2d) 12, 21 C.B.R. (N.S.) 267, 67 D.L.R. (3d) 599 (S.C.) -- referred to

W., Re (1921), 2 C.B.R. 176, 21 O.W.N. 301 (S.C.) -- referred to

Weeks Ltd. v. Canadian Credit Men's Trust Assn. (1962), 40 W.W.R. 312, 4 C.B.R. (N.S.) 182 (B.C. C.A.) -- referred to

Statutes considered:

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

s. 43(13)

s. 67(a)

s. 70(1)

s. 71(1)

Pension Benefits Act, 1987, S.O. 1987, c. 35 --

s. 58(3)

s. 58(4)

s. 58(5)

s. 58(6)

s. 59(1)

s. 59(2)

s. 76(1)

s. 76(2)

Personal Property Security Act, 1989, S.O. 1989, c. 16 --

s. 30(7)

s. 30(8)

s. 33(1)

Regulations considered:

Pension Benefits Act, 1987, S.O. 1987, c.35 --

O. Reg. 708/87,

s. 1

s. 4(1)

s. 4(2)

s. 4(3)

s. 5(1)(b)

s. 11

Application by administrator of company pension plan, on winding-up of company, for payment of amount of deemed trust under s. 58 of Pension Benefits Act, 1987.

***Farley J.*:**

1 Ernst & Yonge Inc. ("administrator") is the administrator appointed by the Superintendent of Pensions pursuant to the *Pension Benefits Act, 1987*, S.O. 1987, c. 35 ("*PBA*") as to the hourly employee pension plan ("plan") at Usarco Limited ("Usarco").

2 The wind-up date for this plan was July 13, 1990, being the date that Usarco ceased operations. A bankruptcy petition was filed by A. Gold & Sons Ltd. ("Gold"), dated January 5, 1990; nothing has proceeded in regard to this petition. The Toronto-Dominion Bank ("bank") is the largest creditor, being exposed for some $18 million; it is secured by a general security agreement which was registered under the *Personal Property Security Act, 1989*, S.O. 1989, c. 16 ("*PPSA*") or a predecessor thereof.

3 The bank applied to the court on October 11, 1990 for the appointment of Coopers & Lybrand Limited ("receiver") as receiver of Usarco for the purpose of selling or otherwise disposing of Usarco's assets. As of April 30, 1991 the receiver had collected $503,571 from accounts receivable, $581,343 from inventory sales, and $475,238 from realization of other assets. This was a total of $1,560,152 less disbursements of $486,532, leaving cash on hand in the amount of $1,073,620.

4 Usarco conducted its business in Hamilton, as a scrap metal dealer and processor. Apparently there are concerns vis-à-vis environmental claims as to the Hamilton property. The bank indicates that it will not move to join the Gold bankruptcy petition and move it forward (the principal of Gold having died) until the Hamilton property is sold. However, the property is now for sale, and the bank claims that it will proceed expeditiously, after the sale, as to the bankruptcy proceedings.

5 Usarco failed to remit regular and special contributions to the plan. The plan did not require employee contributions. Regular contributions are required in respect of benefits accruing in the year contributions are to be made, and special contributions are in respect of unfunded liabilities as determined by a triennial actuarial report, the last of which (May 1989) was made as of December 31, 1988. That report showed that Usarco was $206,920 short. Usarco anticipated it would have been able to transfer a surplus in its salaried employees plan to remedy this; however, this was not permitted by the Pension Commission. Since December 31, 1988, Usarco failed to make regular contributions of $47,853.16 and special ones of $121,748.77, for a total of $169,601.93. Missed contributions then, on that basis, would be a total of $376,521.93.

6 The May 1989 report indicated that as of December 31, 1988 the plan was unfunded to the extent of $711,071. This amount was made up of $295,044 as at the end of 1985 (to be made up by special payments of $35,192 per year over 12 years) and a further $416,027 as at the end of 1988 (to be made up by special payments of $41,702 over 15 years). Deducting the missed special contributions, previously mentioned, to the wind-up date would result in a net of approximately $600,000. There was no solvency deficiency.

7 On November 7, 1990 and December 20, 1990, the administrator's counsel wrote to Usarco and the receiver, giving formal notice that all the assets of Usarco were subject to a lien and charge in favour of the administrator, and demanded payment of the amount of the deemed trust (see: subs. 58(3), (4), (5), (6), *PBA*). The then counsel for the receiver (now counsel for the bank) wrote back on February 7, 1991 and referred to an enclosed copy of the order of Borins J. of October 11, 1990 appointing the receiver. Paragraphs 9 and 10 of that order provided that no proceedings be taken against Usarco or the receiver without leave of the court, but that any interested party be at liberty to apply for further orders on seven days notice.

8 This matter came forward on April 16, 1991 and has been ad journed on consent of the administrator, bank, and receiver a number of times. A term of the adjournment was the undertaking by the receiver to "hold $500,000 collected since November 7, 1991 (sic) from the proceeds of accounts receivable and inventories of Usarco until the return of the motion ...".

9 Leave is granted if it is necessary pursuant to the order of October 11, 1990, to the administrator to bring its motion to have the Receiver pay to the administrator, on behalf of the employee beneficiaries of the plan, the amounts claimed. The bank's motion to stay the administrator's motion is dismissed. While it is possible for the bank to be substituted or added as a petitioner in the Gold bankruptcy petition [s. 43(13) *Bankruptcy Act*, R.S.C. 1985, c. B-3 ("*BA*")], it has not moved to do so. It is now approximately a year and a half since the Gold petition. The bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view, it would be inappropriate for the bank to put all proceedings involving Usarco (including this motion by the administrator) into suspended animation while the bank determined if, as, and when it wished to take action. While the bank might point to the fact that the receiver has undertaken to hold $500,000 until the return of this motion to advance its assertion that the administrator would not be prejudiced awaiting the disposition of the bankruptcy petition, I am mindful of the bank's position that a bankruptcy petition would reverse priorities, that the amount claimed by the administrator is in excess of $500,000, and that the $500,000 being held does not have any interest attributed to it.

10 The relevant provisions of the legislation are as follows:

| PBA | PPSA | BA | PBA Regs. [O. Reg. 708/87] |
|---|---|---|---|
| subss. 58(3), (4), (5), (6) | subss. 30(7), (8) | s. 43(13) | s. 1 (certain definitions) |
| subss. 59(1), (2) | s. 33(1) | s. 67(a) | subss. 4(1), (2), (3) |
| subss. 76(1), (2) | | s. 70(1) | s. 5(1)(b) |
| | | s. 71(1) | |

I have set these out in an appendix.

11 It would appear that if the bankruptcy had come into effect as of a date prior to the administrator's claim, the subject matter of the deemed trust would not have come into existence; see *Re I.B.L. Industries Ltd.* (1991), 4 C.B.R. (3d) 301, 76 D.L.R. (4th) 439, 2 O.R. (3d) 140 (Bktcy.) relying on *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, 34 E.T.R. 1, 75 C.B.R. (N.S.) 1, 38 B.C.L.R. (2d) 145, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164. The *Henfrey Samson* case at p. 18 [C.B.R. (N.S.)] pointed out the principle that the provinces cannot create priorities that would be effective under the *BA* by their own legislation. One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the *BA* which may enhance their position by giving them certain priorities which they would not otherwise enjoy; see: *Re Black Brothers (1978) Ltd.* (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.).

12 Section 71(1) of the *BA* provides that a bankruptcy will have relation back to the date the bankruptcy petition was made; see also: *Re W.* (1921), 2 C.B.R. 176, 21 O.W.N. 301 (S.C.) and *Re Develox Industries Ltd. (No. 3)* (1970), 15 C.B.R. (N.S.) 18 (Ont. S.C.).

13 Therefore, since the bankruptcy petition has not been dealt with, we are presently dealing with a claim by the administrator for certain trust funds held by the receiver. The security interest of the bank is subordinate to the interest of the beneficiaries of the deemed trust (represented by the administrator) (see: s. 30(7), *PPSA*). The bank suggested that it was entitled to a purchase-money security interest in Usarco's inventory and its proceeds (see: s. 30(8), *PPSA*). It did not, however, advance any material to support the proposition that it did not need to send out a purchase-money security interest notice in light of its assertion that it was the only secured creditor or when the inventory came into Usarco's possession, vis-à-vis the bank's financing. I must reject the bank's contention because of this lack of evidence.

14 The administrator's position is that if it enforces its rights and obtains payment, such payment would not be subject to being put back into the bankruptcy pot pursuant to s. 71(1) of the *BA*. In support of this proposition the administrator cites s. 70(1) of the *BA*. L.W. Houlden and C.H. Morawetz, *Bankruptcy Law of Canada*, 3d ed. (Toronto: Carswell, 1989), Vol. 1, pp. 3-120 to 3-122 would appear to support that claim and specifically [at p. 3-121]:

> Section 70(1) does not refer to 'the date of bankruptcy' but to 'every receiving order and every assignment'. In *A.C. Weeks Ltd. v. C.C.M.T.A.* (1962), 4 C.B.R. (N.S.) 182, 40 W.W.R. 312 (B.C. C.A.), the British Columbia Court of Appeal held that the doctrine of relation back in s. 71(1) had no application to s. 70(1), and money paid to a judg-

ment creditor after the filing of a petition but before the making of a receiving order could be retained by the creditor.

15 Aside from the *Weeks* case cited in Houlden and Morawetz [*Weeks Ltd. v. Canadian Credit Men's Trust Assn.* (1962), 40 W.W.R. 312, 4 C.B.R. (N.S.) 182 (B.C. C.A.)], the following cases would also appear to support the administrator's proposition: *Price Waterhouse Ltd. v. Marathon Realty Co.* , [1979] 6 W.W.R. 382, 32 C.B.R. (N.S.) 71, 103 D.L.R. (3d) 699 (Man. Q.B.); *Re Sara* (1985), 56 C.B.R. (N.S.) 282 (Ont. S.C.); *Re Southern Fried Foods Ltd.* (1976), 12 O.R. (2d) 12, 21 C.B.R. (N.S.) 267, 67 D.L.R. (3d) 599 (S.C.); *McLean Co. v. Newton*, 8 C.B.R. 61, [1926] 3 W.W.R. 593, 36 Man. R. 187, (sub nom. *Bortoluzzi v. Kaplan)* [1927] 1 D.L.R. 183 (C.A.).

16 The administrator is taking the steps that it feels are necessary to perfect its claim for the moneys in advance of the determination of the bankruptcy petition, one that conceivably may never be proceeded with further. In this respect, it is further ahead in the foot race than was the creditor attempting to perfect under the *PPSA* in *Re Hillstead Ltd.* (1979), 26 O.R. (2d) 289, 32 C.B.R. (N.S.) 55, 9 B.L.R. 74, 1 P.P.S.A.C. 136, 103 D.L.R. (3d) 347 (S.C.) or the union in the *Re I.B.L.* case, supra. In those cases the claimants brought their actions after the bankruptcy was determined, so that there was no hope of having completely executed payment prior to the bankruptcy determination. The deemed trust provision would also imply a fiduciary obligation on the part of Usarco. A trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation.

17 It seems to me that the administrator's position would be stronger than the types of claims set out in the above cases since it comprises a trust claim. If so, then according to s. 67(*a*) of the *BA*, such trust property would not be property of a bankrupt divisible amongst its creditors. The administrator asserts that the deemed trust under the *PBA* has been converted into a true trust either (a) by notice or (b) by virtue of an actual separation of the funds by the receiver. A true trust would, if it exists, prevail against a competing claim of a trustee in bankruptcy. While it appears to me that the administrator gave notice to the receiver by the November and December letters (with an estimated amount of the deemed trust of $489,928), it does not seem that the receiver had notice of any further claim until June19, 1991 when the administrator advanced a further claim for approximately $600,000 plus interest. As to the question of an actual separation of funds by the receiver, the administrator relies on the terms of the undertaking given on one of the multiple adjournments of this matter. Its text is as follows:

> On consent adjourned to May 13, 1991 on the undertaking of the Receiver to
>
> 1. hold $500,000 collected since November 7, 1991 [sic] from the proceeds of accounts receivable and inventories at Usarco until the return of the motion on May 13, 1991, and
>
> 2. notify the Applicant of any motion for an order directing the Receiver to pay any funds in its hand to any creditor of Usarco or Frank Levy.

18

> (Indicated signed by counsel for the bank, receiver, and administrator.)

19 I would think that the claim of an actual separation of funds may not overreach what was said in this understanding. While there is no promise to hold the funds apart and separate per se, I do think that this can be inferred by the fact that para. 2 of the undertaking requires the receiver to notify the administrator of a motion to the effect of directing the receiver to pay out any funds (which I assume would include the $500,000 to any creditor of Usarco). The undertaking therefore would seem to have the $500,000 as being the subject matter of this judicial determination as to the administrator's trust claim. On this basis, it may meet the test of separation enunciated in the *Re I.B.L.* case, supra. Certainly, the administrator has given Usarco and the receiver notice, to the extent of $489,928.

20 If the funds are true trust funds, then they will not be property of Usarco in the event that Usarco is determined to be bankrupt (see s.67(*a*), *BA*). It is clear that if the funds are merely deemed to be trust funds, then such deeming is not sufficient to segregate such for the purposes of the *BA* (see: *Re I.B.L.* case, supra, at pp. 143-144 [O.R.]).

21 Section 58(4) of the *PBA* provides that the amount deemed to be held in trust on a wind-up situation is:

> equal to employer contributions accrued to the date of the wind-up but not yet due under the plan or regulations.

This should be contrasted with the language of s. 58(3), which deals with a non wind-up situation:

> equal to the employer contributions due and not paid into the pension fund.

Section 76(1)(*a*) obliges the employer in a wind-up situation to pay into the pension fund an amount "equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund." In this context what do "accrued", "due", "not yet due", and "not yet paid" mean? What is the extent of the trust? Does it apply to the non-current and unfunded liability; does it support a claim for inter est?

22 The administrator relies on the analysis of Duff J. in *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306, [1923] 2 D.L.R. 578, to support its claim for the additional moneys, which are referred to as the non-current, unfunded liability. DuffJ. indicated at pp. 312-313 [S.C.R.]:

> The subjects of this provision are such interest and sums payable for the purpose of a sinking fund as shall have accrued but shall not be due at the time mentioned; and in order to apply the provision you must ascertain what interest and what sums of the character mentioned fall at the specified time within the described category -- the category defined by the words
>
> > interest and sinking fund payments ... accrued ... but not yet due.
>
> The word 'due' in relation to moneys in respect of which there is a legal obligation to pay them may mean either that the facts making the obligation operative have come into existence with the exception that the day of payment has not yet arrived, or it may mean that the obligation has not only been completely constituted but is also presently exigible. That it is used in the latter sense, in the present instance is perfectly clear -- otherwise the contrast expressed between payments 'accrued' and payments 'due' would, especially in the case of interest, be patent nonsense. The most natural meaning of such a phrase as 'accrued payments' would be, and standing alone it would *prima facie* receive that reading, moneys presently payable; but the word 'accrued' according to well recognized usage has, as applied to rights or liabilities the meaning simply of completely constituted -- and it may have this meaning although it appears from the context that the right completely constituted or the liability completely constituted is one which is only exercisable or enforceable *in futuro* -- a debt for example which is *debitum in praesenti solvendum in futuro*. It is in this sense that it has been widely applied to express the fact that such a liability has been created in relation to a sum of money, part of a whole (made up of an accumulation of such parts) which is not to be payable until a later date, and it is in this sense that it seems to be used in the clause before us.

23 Quite clearly, in a wind-up situation, the wording of s. 58(4) [*PBA*] is to oblige the employer (Usarco) with a trust arrangement concerning those contributions which are accrued, even though such may not be due under the plan. This is distinct from an ongoing situation envisaged by s. 58(3) [*PBA*], where such obligation is with respect to contributions which are then due but not yet paid over to the pension fund. Section 58(5) [*PBA*] gives the administrator a lien and a charge over the

deemed trust amounts. By s. 58(6) [*PBA*], the deemed trust applies whether or not the employer kept these moneys separate and apart. It is clear from s. 76(1)(*a*) [*PBA*] that "due" and "accrued" are not identical, as they are referred to separately therein.

24 The Regulations to the *PBA* are not particularly helpful in distinguishing on the basis of "contributions" versus "special payments". While it is true that s. 4(2)(*c*) of the Regulations refers to "special payments" without, as in subss. 4(2)(*a*) and (*b*), indicating these are contributions, it is also true that s. 4(3)4 refers to "employer contributions for a special payment." I also note that s. 4(1) refers to a contribution "both in respect of the normal cost [that is, a regular payment] and any going concern unfunded actuarial liabilities" [i.e., special payments]. I conclude that, as is the case with so much technical legislation, particularly if it has been patchworked, the language of intent has simply not been fully coordinated. The *PBA* and Regulations thereunder are legislation which is not designed for persons not actively working in the field to tread in with any comfort.

25 However, it should be noted that s. 76(1) of the *PBA* is segregated into two parts, (*a*) and (*b*). Section 76(1)(*b*) appears to deal with special payment requirements envisaged by "going concern assets", "going concern liabilities", "going concern unfunded", "actuarial liability", and "going concern evaluation". This is so especially when "going concern liability" is said to mean "the present value of the accrued benefits of a pension plan determined on the basis of a going concern valuation" [s. 1, *PBA Regs.*]. Such going concern valuation is one that is required in the triennial report as set out in s. 11 of the regulations. Section 76(1)(*b*)(ii) appears to pick up the concept of the unfunded liability that was to have been made good by the special payments. Section 76(1)(*b*) is then to be contrasted with s. 76(1)(*a*), which deals with payments which are "due or that may have accrued" but have not yet been paid into the pension fund. This contrast implies that the special payments are not either due or accrued, as otherwise s. 76(1)(*b*)(ii) would be redundant. Section 5(1) of the Regulations speaks of the special payments being required to "amortize" a "going concern unfunded actuarial liability. ..." The *Oxford (Shorter) Dictionary*, 3d ed. (1988), reprinted, defines "amortized" as "to extinguish a debt, etc. usually by means of a sinking fund." Thus it denotes a setting aside of the moneys, not payment. It is also evident that such special payments in a going concern situation may fluctuate depending on the investment results of the pension fund and the employer's ongoing contributions, together with the es timated demands on the fund by the beneficiaries. As of the date of crystallization being the wind-up date, the situation in the pension plan may be (significantly) different from that set forth in the last triennial report. At that time (or rather as of that time) it will be known what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim.

26 It therefore appears to me that the deemed trust provisions of subs. 58(3) and (4) only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation, that would be the regular and special payments that should have been made but were not (as reflected in the report as of December 31, 1988), together with any regular or special payments that were scheduled to have been made by the wind-up date, July 13, 1990, but were not made. This is contrasted with the obligation of Usarco to fully fund its pension obligations as of the wind-up date pursuant to s. 76(1). It is recognized in these circumstances, however, that the bank will have a secured position which will prevail against these additional obligations as to the special payments, which have not yet been required to be paid into the fund. Sadly, it is extremely unlikely there will be a surplus after taking care of the bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency).

27 On that basis, I believe that there is merit in the bank's position that s. 58(4) takes into account those employee contributions (regular and special payments) which are developing, but not yet, but for that subsection, required to be paid into the pension plan. See Canadian Institute of Chartered Accountants, *Terminology for Accountants*, 3d ed. (C.I.C.A.: 1983), at p. 5, where "accrue" is defined as "in accounting, to record that which has accrued with the passage of time in connection with the rendering or receiving of service (e.g., interest, taxes, royalties, wages), but the payment of which is not enforceable at the time of recording." Section 59(1) states: "Money that an employer is required to pay into a pension fund accrues on a daily basis." Therefore, in my view the trust extends to the amount that Usarco was obligated to pay into the pension fund, prorated to July13, 1990.

28 It also seems to me that s. 59(2) of the *PBA* deals with the question of interest. It states: "Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements." This in my view means that interest is to be paid on contributions that are unpaid. I base this on the fact that contributions which are paid will generate income based upon what investments are in fact made (and could be interest, dividend, or other basket clause income), and secondly, that this obligation seems to relate to the obligations of the employer set out in the other part of the section (i.e., s. 59(1)).

29 There is then to be an order in the following terms:

(1) An order granting the administrator leave to bring this motion as per the order of Borins J. dated October 11, 1990.

(2) An order directing the receiver to pay the administrator an amount of money equal to the regular and special payments required to have been made but not yet paid into the pension plan, prorated to July 13, 1990, together with interest at the prescribed rate as set out in s. 59(2) of the *PBA* on all unpaid amounts from the date such were due to, and including the date of payment under this order. Counsel should be able to work out these amounts with their respective pension consultants, but if they are unable to do so, they may speak to me further.

(3) As to the question of costs, the receiver took the position that it was merely a stakeholder, and asked for its costs in the amount of $3,500. I award the receiver costs in that amount, payable out of the funds that it holds. As between the administrator and the bank, there were mixed results. It is also to be noted that apparently the question of the non-current, unfunded liability was a novel one. Balancing these factors together with the additional factor that the bank did not wish to proceed with the bankruptcy matter until a time convenient to it (if at all), I am of the view that the administrator should have part of its costs payable by the bank. I estimate those related to the current, unfunded liabilities as being $3,500. In accordance with the usual procedures, costs are to be payable forthwith.

*Application allowed.*

. . . . .

**Appendix -- PBA**

58. -- (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

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

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

(6) Subsections (1), (3) and (4) apply whether or not the moneys have been kept separate and apart from other money or property of the employer.

59. -- (1) Money that an employer is required to pay into a pension fund accrues on a daily basis.

(2) Interest on contributions shall be calculated and credited at a rate not less than the prescribed rates and in accordance with prescribed requirements.

76. -- (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(*a*) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(*b*) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and regulations if the Commission declares that the Guarantee Fund applies to that pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 40(3) (50 per cent rule) and section 75,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

(2) The employer shall pay the moneys due under subsection (1) in the prescribed manner and at the prescribed times.

**Regulations**

1. -- (1) In this Regulation,

"special payment" means a payment or one of a series of payments determined for the purpose of liquidating a going concern unfunded actuarial liability or solvency deficiency.

(2) In this Part,

"going concern assets" means the value of the assets of a pension plan including accrued and receivable income determined on the basis of a going concern valuation;

"going concern liabilities" means the present value of the accrued benefits of a pension plan determined on the basis of a going concern valuation;

"going concern unfunded actuarial liability" means the excess of going concern liabilities over going concern assets;

"going concern valuation" means a valuation of assets and liabilities of a pension plan using methods and actuarial assumptions considered by the actuary who valued the plan to be in accordance with generally acceptable actuarial principles and practices for the valuation of a continuing pension plan;

4. -- (1) Every pension plan shall set out the obligation of the employer or any person required to make contributions on behalf of an employer, to contribute both in respect of the normal cost and any going concern unfunded actuarial liabilities and solvency deficiencies under the plan.

(2) An employer who is required to make contributions to a pension plan or any person who is required to make contributions on behalf of an employer to a pension fund shall make payments to the pension fund or to the insurance company, as applicable, of amounts that are not less than the sum of,

(*a*) any contributions received from employees, including money withheld from an employee, whether by payroll deduc tion or otherwise, as the employee's contribution to the pension plan;

(*b*) contributions required to pay the normal cost; and

(*c*) special payments determined in accordance with section 5.

(3) The payments referred to in subsection (2) shall be made by the employer or the person who is required to make contributions on behalf of the employer within the following time limits:

1. All sums received by the employer from an employee or deducted from an employee's pay as the employee's contribution to the pension plan, within thirty days following the month in which the sum was received or deducted.

2. Employer contributions in respect of the normal cost for the period prior to the 1st day of January, 1988, not later than 120 days after the end of the fiscal year of the plan.

3. Employer contributions in respect of the normal cost for any period on or after the 1st day of January, 1988, in monthly instalments within thirty days after the month for which contributions are payable, the amount of such instalments to be either a fixed dollar amount, a fixed dollar amount for each employee or member of the plan or a fixed percentage of either that portion of the payroll related to members of the pension plan or employee contributions, in accordance with such contributions as are certified under clauses 10(1)(a) or 11(2)(a).

4. Employer contributions for a special payment required to be made with respect to a fiscal year of the plan commencing prior to the 1st day of January, 1988, within thirty days after the end of the fiscal year.

5. All special payments determined in accordance with section 5, other than a payment made under paragraph 4, by equal monthly instalments throughout the fiscal year of the plan.

5. -- (1) Subject to subsections (2) and (3) and section 7, the special payments to amortize a going concern unfunded actuarial liability or solvency deficiency shall not be less than the sum of,

(*a*) any remaining special payments determined in accordance with subsection (5) with respect to an initial unfunded liability or experience deficiency within the meaning of Regulation 746 of Revised Regulations of Ontario, 1980 (General) as it existed on the 31st day of December, 1987;

(*b*) the amount required to liquidate by equal instalments, with interest at the going concern valuation rate, any other going concern unfunded actuarial liability within a period of fifteen years after the date on which the going concern unfunded actuarial liability arose;

(*c*) the amount required to liquidate by equal instalments, with interest at the solvency valuation interest rate, any solvency deficiency, other than that part of a solvency deficiency referred to in clause (d), within five years after the review date of the solvency valuation in which the solvency deficiency is identified; and

(*d*) the amount required to liquidate by equal instalments that part of any solvency deficiency that exists on the 1st day of January, 1988 that is attributable to the application of subsection 75(7) of the Act, with interest at the solvency valuation interest rate, within fifteen years from that date.

**PPSA**

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, 1987*.

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

33. -- (1) A purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor, if,

(*a*) the purchase-money security interest was perfected at the time,

(i) the debtor obtained possession of the inventory, or

(ii) a third party, at the request of the debtor, obtained or held possession of the inventory,

whichever is earlier;

(*b*) before the debtor receives possession of the inventory, the purchase-money secured party gives notice in writing to every other secured party who has registered a financing statement in which the collateral is classified as inventory before the date of registration by the purchase-money secured party; and

(*c*) the notice referred to in clause (b) states that the person giving it has or expects to acquire a purchase-money security interest in inventory of the debtor, describing such inventory by item or type.

**BA**

43.(13) Where proceedings on a petition have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is deemed just, substitute or add as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act and make a receiving order on the petition of the other creditor, and shall thereupon dismiss on such terms as it may deem just the petition in the stayed or non-procsecuted proceedings.

67. The property of a bankrupt divisible among his creditors shall not comprise

(*a*) property held by the bankrupt in trust for any other person,

70. (1) Every receiviing order and every assignment made in pursuance of this Act takes precedence over all judicial or other

attachmentss, garnishments, certificates having the effect of judgments, judgments, certificats of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and except the rights of a secured creditor.

71. -(1) A bankruptcy shall be deemed to have relation back to, and to commence at the time of the filing of, the petition on which a receiving order is made or of the filing of an assignment with the official receiver.

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# TAB 8

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Ted LeRoy Trucking Ltd. (Re),***
2009 BCCA 205

Date: 20090507
Docket: CA036474

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

**and**

**In the Matter of the *Business Corporations Act*, R.S.B.C. 2002, c. 57**

**and**

**In the Matter of Ted LeRoy Trucking Ltd. and 383838 B.C. Ltd.**

Between:

**The Attorney General of Canada on behalf of Her Majesty the Queen in right of Canada**

Appellant

And

**Ted LeRoy Trucking Ltd., 383838 B.C. Ltd., Century Services Inc. and PricewaterhouseCoopers Inc. in its capacity as Monitor**

Respondents

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

| | |
|---|---|
| D.W. Jacyk and K.K. Khalsa | Counsel for the Appellant |
| M.I.A. Buttery and M.J.G. Curtis | Counsel for the Respondent, Century Services Inc. |
| Place and Date of Hearing: | Vancouver, British Columbia<br>March 30, 2009 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>May 7, 2009 |

**Written Reasons by**:
The Honourable Mr. Justice Tysoe

**Concurred in by:**
The Honourable Madam Justice Newbury
The Honourable Madam Justice D. Smith

**Reasons for Judgment of the Honourable Mr. Justice Tysoe:**

[1] Her Majesty the Queen in right of Canada (the "Crown") appeals from an order dismissing its application on the eve of the bankruptcy of Ted LeRoy Trucking Ltd. (the "Debtor Company") to have funds being held in trust paid to the Receiver General for Canada.

[2] The Debtor Company commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), on December 14, 2007. As is typical in *CCAA* proceedings, the Debtor Company obtained an order staying all proceedings while it attempted to restructure its financial affairs, and an accounting firm was appointed as Monitor.

[3] The Debtor Company owed the Crown, pursuant to the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "*ETA*"), in respect of goods and services tax ("GST") collected by the Debtor Company from third parties. The aggregate amount collected in reporting periods preceding the *CCAA* filing, but not remitted to the Receiver General, was the sum of $305,202.30.

[4] The *ETA* provides the Crown with rights to enforce payment of unremitted GST collections. One example, which is not in issue on this appeal, is the right given to the Minister of Finance under s. 317 to issue a form of garnishment called a requirement to pay.

[5] The enforcement right given to the Crown in issue on this appeal is contained in s. 222 of the *ETA*, and is commonly referred to as the "deemed trust" provision.

Subsection (1) provides that all amounts collected on account of GST are deemed to be held by the person collecting them in trust for the Crown until they are remitted to the Receiver General. Subsection (3) creates a deemed trust in respect of the property of the person collecting the GST, as follows:

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
> >
> > (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[6] The Debtor Company had been authorized by the court to conduct sales of its redundant equipment, and it applied on April 29, 2008 for court approval of the distribution of the sale proceeds. The Debtor Company proposed that, subject to a holdback of the $305,202.30 owed to the Crown on account of GST, an amount not exceeding $5 million be paid to Century Services, the major secured creditor of the Debtor Company. Over the objection of the Crown, which wanted the monies paid

directly to it, the chambers judge agreed with the Debtor Company's proposal and ordered that the Monitor hold the sum of $305,202.30 in its trust account pending further order of the court. No appeal was taken by the Crown from this order.



[7] The Debtor Company eventually came to the realization that it could not successfully reorganize its financial affairs. It applied on September 3, 2008 for court approval of the distribution of further sale proceeds and for leave to assign itself into bankruptcy. The Crown applied on the same day for an order that the monies held in trust by the Monitor be paid to the Receiver General. The chambers judge heard the Debtor Company's application first and granted it. He then heard and dismissed the Crown's application.

[8] The reasoning of the chambers judge in dismissing the Crown's application was as follows (2008 BCSC 1805):

> [5] I recognize that the funds collected by the petitioners pre-filing were the subject [of] the deemed trust provisions in the legislation. Monies were collected by the petitioner from third parties on behalf of Canada and they were not paid over to Canada. However, the triggering date was the date of the *CCAA* filing. Under the existing *CCAA* law, the court is required to maintain the status quo amongst the parties as of that date. At the date of the first day order the outstanding GST monies were owed but had not been remitted and remained in the possession of the petitioner.
>
> [6] In my view the amounts that were segregated were done to facilitate an ultimate payment of the GST monies which were owing pre-filing, but only if a viable plan emerged at the conclusion of the *CCAA* process. That has not happened. The reality is there will never be a plan in this case, but merely a sale of assets under the *BIA* as well as under the *CCAA* continued stay. That being so, it seems to me that the Crown has simply lost its preference under the provisions of the *BIA* and that that is simply a consequence of the way in which this restructuring has ended. It is no different than if the petitioner had filed under the *BIA* at the outset. The Crown is simply in the position that it

> is entitled to be in under the *BIA*. It will have the rights that Parliament has chosen to confer upon it under that legislation.

[9] It was agreed between the parties that two additional pieces of information could be admitted on this appeal. The first is that the Debtor Company did make an assignment in bankruptcy on September 4, 2008, and the Monitor was named the trustee in bankruptcy, as well as being appointed receiver under the security held by Century Services. The second is that the Monitor invested the $305,202.30 sum in a term deposit when the monies were received from the Debtor Company and that, on or after September 4, the term deposit plus interest thereon ($308,245.15) was paid into the general trust account of the trustee/receiver, which contained other funds.



[10] Before discussing the decision of the chambers judge, I will provide a backdrop by reviewing general principles of the *CCAA* and outlining the introduction of the provisions of the *CCAA* dealing with Crown claims. I will also briefly make reference to the nature of the deemed trust provision in favour of the Crown.

[11] Much has been written about the purpose of the *CCAA* and the stay provisions of s. 11 of the Act. One of the most often cited passages is the following paragraph from *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 315, 51 B.C.L.R. (2d) 84 (C.A.):

> [10] The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to

> preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

[12] Similar comments were made in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 at 317, 96 O.T.C. 272 (Ont. Ct. Jus. (Gen. Div.)):

> [7] Section 11 of the CCAA is the provision of the Act embodying the broad and flexible statutory power invested in the court to "grant its protection" to an applicant by imposing a stay of proceedings against the applicant company, subject to terms, while the company attempts to negotiate a restructuring of its debt with its creditors. It is well established that the provisions of the Act are remedial in nature, and that they should be given a broad and liberal interpretation in order to facilitate compromises and arrangements between companies and their creditors, and to keep companies in business where that end can reasonably be achieved: ... [citations omitted]

[13] When the use of the *CCAA* was resurrected in the late 1980s and early 1990s after a period of dormancy, there was uncertainty as to whether the Crown was bound by orders made in *CCAA* proceedings. There were a number of conflicting decisions, including *Re Fine's Flowers Ltd.* (1993), 108 D.L.R. (4th) 765, 22 C.B.R. (3d) 1 (Ont. C.A.), where it was held that the *CCAA* did not bind the Crown. This undermined the utility of the *CCAA* and, as a result, several provisions were added to the *CCAA* in the 1997 round of amendments to the Act (S.C. 1997, c. 12). The most important of these provisions was s. 21, which specifically provides that the *CCAA* is binding on the Crown.

[14] Parliament simultaneously enacted several other provisions in the *CCAA* dealing with specific Crown claims and rights of enforcement. Section 11.4 was added to provide that a stay order can stay the garnishment rights of the Crown under s. 224(1.2) of the *Income Tax Act* and similar provisions in the *Canada Pension Plan* and the *Employment Insurance Act* (and comparable provisions under provincial legislation), provided that, among other things, the debtor company remains current in respect of amounts due to the Crown after the date of the stay order. Section 18.2 was added to provide that if an order does stay the provisions referred to in s. 11.4, no compromise or arrangement shall be sanctioned by the court unless it provides for payment in full to the Crown within six months of the amounts outstanding at the date of the stay order that could have been garnished in the absence of the stay order or unless the Crown consents. Other additions dealt specifically with environmental claims (s. 11.8(3) to (9)), workers' compensation (s. 18.4), and registered security held by the Crown (s. 18.5).



[15] The addition to the Act of particular importance to this matter is s. 18.3(1) dealing with deemed trusts in favour of the Crown:

> 18.3(1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Subsection (2) of s. 18.3 provides that subsection (1) does not apply to the deemed trust provisions in certain sections of the *Income Tax Act*, the *Canada Pension Plan*

and the *Employment Insurance Act* (as well as similar provincial legislation). Subsection (2) does not mention s. 222 of the *ETA*.

[16] Provisions virtually identical to ss. 18.3(1) and (2) are also contained in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), (namely, ss. 67(2) and (3)). That is why, generally speaking, deemed trusts in favour of the Crown are not effective in a bankruptcy situation, with the result that the Crown ranks in priority behind secured creditors in respect of the unremitted amounts giving rise to the deemed trusts.



[17] The Supreme Court of Canada considered the nature of the deemed trust under s. 227(4.1) of the *Income Tax Act* (which is identical in material respects to s. 222(3) of the *ETA*) in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720. The issue in that case was whether the Crown could claim against accounts receivable that were factored by the taxpayer to a third party after the deemed trust had come into existence as a result of the failure of the taxpayer to make required remittances. In holding that the Crown could not claim against the factored accounts receivable, Mr. Justice Iacobucci likened the deemed trust to a floating charge:

> [40] In my view, the scheme envisioned by Parliament in enacting ss. 227(4) and 227(4.1) is that the deemed trust is in principle similar to a floating charge over all the assets of the tax debtor in the amount of the default. As noted above, the trust has priority from the time the source deductions are made, and remains in existence as long as the default continues. However, the trust does not attach specifically to any particular assets of the tax debtor so as to prevent their sale. As such, the debtor is free to alienate its property in the ordinary course, in which case the trust property is replaced by the proceeds of sale of such property.

[18] Mr. Justice Iacobucci also commented at para. 27 that the deemed trust in s. 227(4.1) of the *Income Tax Act* had been strengthened by amendments in 1998 in response to the court's earlier decision in *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, 143 D.L.R. (4th) 385. The deemed trust provision of the *ETA* was similarly strengthened in 2000 (S.C. 2000, c. 30, s. 50) by the enactment of the present versions of ss. 222(1) and (3). One of the changes from the previous deemed trust provision in the *ETA* was the inclusion of the opening phrase of subsection (3): "Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), ..."

[19] In *Re Ottawa Senators Hockey Club Corp.* (2005), 6 C.B.R. (5th) 293, 73 O.R. (3d) 737 (C.A.), the Ontario Court of Appeal was called upon to reconcile s. 18.3(1) of the *CCAA* and s. 222(3) of the *ETA* in view of the fact that they both contained clauses with "notwithstanding" language. In that case, the Ottawa Senators Hockey Club Corporation commenced a *CCAA* proceeding but when negotiations on a restructuring proposal foundered, its assets were sold to a third party. The sale was approved by an order made in the *CCAA* proceeding. At issue was whether the deemed trust under s. 222(3) of the *ETA* was to be recognized, enabling the Crown to recover the unremitted GST out of the sale proceeds in priority to the claims of secured creditors.

[20] Relying on the principles of statutory interpretation flowing from the facts that s. 18.3(1) of the *CCAA* was enacted earlier and was more specific than s. 222(3) of the *ETA*, the court held that s. 222(3) was to be given preference. The result was that the deemed trust for GST survived in a *CCAA* proceeding; the Crown was

entitled to be paid the amount of the unremitted GST from the sale proceeds before any of the sale proceeds were distributed to secured creditors.

[21] In the present case, the Crown relies heavily on *Ottawa Senators* and says that the chambers judge did not have a discretion to ignore the legislative will expressed in s. 222(3) of the *ETA*. With great respect to the chambers judge, I agree. It is also my view that there was an actual or express trust that should have been recognized by the chambers judge.



[22] While the chambers judge had the authority to stay the Crown's right to enforce the s. 222(3) deemed trust during the period in which the Debtor Company attempted to reorganize its financial affairs, it is my view that, after the restructuring efforts came to an end, the chambers judge did not have a discretion to ignore the deemed trust under s. 222 of the *ETA* or the express trust that was created in favour of the Crown when the Debtor Company paid the funds into the trust account of the Monitor.

[23] At the time of the hearing of the application, the chambers judge was acting under the *CCAA*. There was no longer any purpose under the *CCAA* to prevent the Crown from exercising its rights under the deemed trust or from receiving the funds being held in trust. The chambers judge was being asked to make a decision on the disposition of the funds being held in trust by the Monitor. Under the statutory regime in existence on that day, the Crown was entitled to rely on the deemed trust and the express trust. There was no reason to delay the decision and, as in *Ottawa Senators*, the funds should have been ordered to be paid to the Crown. The effect

of the chambers judge's decision was to apply the scheme of distribution under the *BIA* before that Act had become engaged by the bankruptcy of the Debtor Company. In my opinion, the chambers judge did not have the discretion to decide whether the pre-bankruptcy or post-bankruptcy scheme of distribution should be preferred. He was bound to apply the scheme of distribution in effect at the time he was asked to deal with the funds.



[24] It is my view that an express trust was created once the chambers judge made his order of April 29, 2008 and the $305,202.30 sum was paid into the trust account of the Monitor. In my opinion, the common law requirements for a trust (being certainty of intent, subject matter and object) were all met. There is no doubt that the monies were intended to be held in trust and that the investment of the funds in a term deposit kept them identifiable.

[25] It may be argued that there was not sufficient certainty of object because the April 29 order stipulated that the funds were to be held in trust pending further order of the court, and the court could have ordered the funds to be paid to someone other than the Receiver General. It is my view there was sufficient certainty of object for two reasons. The first is the wording of the order itself:

> 2. the Monitor shall, pending further Order of the Court, hold the sum of $305,202.30 in its trust account in respect of the amount owing by [the Debtor Company] to the Canada Revenue Agency for pre-filing Goods and Services Tax.

The funds were being held in trust for the pre-filing GST, which was owed to the Crown.

[26] Secondly, after the payments were made pursuant to the April 29 order, I am of the view that the court did not have the option of ordering the payment of the trust funds to any person other than the Receiver General. The closing words of s. 222(3) of the *ETA* provide that the Crown has a deemed trust covering the proceeds of the property of the person who collected the GST and that "the proceeds of the property shall be paid to the Receiver General in priority to all security interests". The court could not have authorized a payment to a secured creditor out of the proceeds from the sale of assets of the Debtor Company without ensuring payment of the GST to the Receiver General. Otherwise, the court would be sanctioning a breach of trust because it would be authorizing payment of proceeds covered by the deemed trust to a secured creditor in direct contravention of the closing phrase of s. 222(3). Hence, after the payment of the majority of the sale proceeds was made to Century Services, the court was required to ultimately order that the sum put aside on account of GST be paid to the Receiver General.

[27] An express trust was found in the somewhat analogous circumstances of *Alnav Platinum Group Inc. v. APM Delstar Inc.,* 2001 ABQB 930, 32 C.B.R. (4th) 1. There, a secured creditor had acted on its security and had collected accounts receivable owing to the debtor company. The amounts collected included GST. The amount collected exceeded the amount owed to the secured creditor and it paid the surplus to a receiver appointed at the instance of another secured creditor. The first secured creditor and the receiver entered into a "Proceeds Agreement" that referred to "Pre-Receivership G.S.T.", and the Alberta Queen's Bench ordered that the sum relating to GST claims be paid by the receiver into a separate account. On a

subsequent application after the debtor company had been adjudged bankrupt, the court held that an express trust had been created and that the funds were to be paid to the Crown.



[28] In the same fashion that the Crown relies on the decision in *Ottawa Senators*, Century Services relies heavily on two decisions, *Minister of National Revenue v. Points North Freight Forwarding Inc.*, 2000 SKQB 504, 24 C.B.R. (4th) 184, and *Re Ivaco Inc.* (2006), 275 D.L.R. (4th) 132, 25 C.B.R. (5th) 176 (Ont. C.A.).

[29] In *Points North*, a stay had been granted under the *CCAA* and the Crown applied to amend the stay order to allow it to exercise its garnishment rights under s. 317(3) of the *ETA*. Mr. Justice Barclay held that despite the fact that s. 11 of the *CCAA* does not mention the garnishment provision of the *ETA* (while mentioning similar provisions in other federal statutes), it was nevertheless intended by Parliament that an order under s. 11 of the *CCAA* can stay the enforcement rights of the Crown under s. 317(3) of the *ETA*. Century Services particularly relies on the following paragraph from *Points North*:

> [14] I agree with counsel for the respondents that there is no actual conflict as an order under s. 11 merely suspends the Crown's right under s. 317 of the *Excise Tax Act* as the Court deems necessary in order to allow the debtor to submit a proposal. The Crown's rights are not taken away, they are merely suspended. If the proposal is rejected by the creditors or the stay of proceedings is lifted, the Crown is then in a position to exercise its full rights under s. 317.

[30] I do not quarrel with the proposition that an order under s. 11 of the *CCAA* can stay the enforcement rights of the Crown. However, when the restructuring efforts have come to an unsuccessful end, the Crown is then in a position to

exercise its rights under the deemed trust. In addition, the s. 11 stay powers do not permit the court to authorize a breach of the deemed trust for the benefit of another creditor.



[31] The facts in *Ivaco* do have some similarity to the case at bar. The debtor company was not able to restructure under the *CCAA* and its assets were sold. Two secured creditors brought motions to have the *CCAA* stay lifted so that they could petition the debtor company into bankruptcy. The Ontario Superintendent of Financial Services made a concurrent motion for an order that part of the sale proceeds be paid to satisfy unpaid pension contributions which were deemed by s. 57 of the *Pension Benefits Act*, R.S.O. 1990, c. P.8, to be held in trust for the employees.

[32] The Ontario Court of Appeal upheld the decision of the motions judge dismissing the Superintendent's application and allowing the bankruptcy petitions to proceed. The court rejected the Superintendent's arguments that the motions judge was required to order the segregation of the amount of the deemed trusts during the *CCAA* proceedings and that the motions judge was required in law to order that the amount of the deemed trusts be paid at the end of the *CCAA* proceeding but before bankruptcy.

[33] In my opinion, *Ivaco* is distinguishable on a number of bases. In the case at bar, funds had previously been paid into a trust account in respect of GST, but no funds had been earmarked in *Ivaco*. Here, I have found an express trust in favour of the Crown, while the Superintendent in *Ivaco* was relying only on the deemed trust.

The deemed trust under s. 57 of the *Pension Benefits Act* is not as strong as the deemed trust under s. 222 of the *ETA* in several respects. Section 57 does not specify any property of the debtor company to be held in trust but, rather, s. 57(3) provides that the administrator of the pension plan has a lien and charge on the assets of the debtor company. Also, s. 57 does not contain "notwithstanding" language or a requirement similar to the one in s. 222(3) that "proceeds of the property shall be paid to the Receiver General in priority to all security interests".



[34] I find of interest one of the comments made by Mr. Justice Laskin in rejecting the Superintendent's second argument, where he said the following:

> [60] The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds. See for example *Re United Maritime Fishermen Co-op* (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.) at 173.

In the context of the present case, the chambers judge did have authority to order the funds to be paid out of the Monitor's trust account because they were paid into the trust account pending further order of the court. It was clearly contemplated that there would be an order in the *CCAA* proceedings directing the payment of the funds out of the trust account.

[35] Mr. Justice Laskin's comments are of interest because he questioned whether the motions judge had any authority to make further orders once restructuring was

not possible and the *CCAA* proceedings were spent. In the case at bar, once restructuring possibilities had been exhausted and the *CCAA* proceedings were spent, there was no reason to prevent the Crown from exercising its rights in relation to the funds being held in trust. The distinction in this regard between *Ivaco* and this case is that the motions judge in *Ivaco* was being asked to execute the deemed trusts, while the chambers judge in this case was simply being asked to release monies that were being held in a trust account in respect of GST.



[36] The final point I wish to address is Century Services' argument that public policy favours its position because insolvent companies should be encouraged to attempt to restructure rather than to file for bankruptcy. Century Services relies on the following two sentences from *Ivaco*:

> [64] ... Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

The chambers judge in this case appears to have agreed with this public policy argument because he stated in para. 6 of his reasons for judgment that the result of dismissing the Crown's application was no different than if the Debtor Company had filed under the *BIA* at the outset.

[37] I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here,

Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA.*



[38] For these reasons, I would allow the appeal and order that the funds paid into the trust account of the Monitor, together with interest earned thereon, be paid to the Receiver General.

"The Honourable Mr. Justice Tysoe"

**I agree:**

"The Honourable Madam Justice Newbury'

**I agree:**

"The Honourable Madam Justice D. Smith"

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

Court File No: CV-09-8122-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Applicants

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

# BOOK OF AUTHORITIES

(Motion by retirees re: Deemed Trust, returnable August 28, 2009)


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