TAB 1

1989 CarswellBC 351

British Columbia v. Henfrey Samson Belair Ltd.

R. IN RIGHT OF BRITISH COLUMBIA v. HENFREY SAMSON BELAIR LTD. et al.

Supreme Court of Canada

Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.

Heard: April 21, 1989
Judgment: July 13, 1989
Docket: No. 20515

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Subject: Corporate and Commercial; Insolvency; Estates and Trusts; Provincial Tax

Taxation --- Provincial and territorial taxes -- General taxation principles -- Priority of tax claims in bankruptcy proceedings.

Bankruptcy --- Priorities of claims -- Claims of Crown -- Provincial -- General.

75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

Secured creditors -- Priorities -- Debentures -- Statutory trust for provincial sales tax -- Bankrupt commingling sales tax collected with own assets -- Receiver applying all assets to debenture holder's indebtedness -- Province claiming statutory trust under Social Service Tax Act having priority under Bankruptcy Act -- Statutory trust not conforming to principles of general trust law after property converted -- Province only having claim secured by statutory charge or lien -- Claim falling within s. 107(1)(j) of Bankruptcy Act.

Property of bankrupt -- Trust property -- Definition of "trust" to be applied for purposes of exemption under Bankruptcy Act being within sole legislative competence of federal government.

T. collected provincial sales tax in the course of its business operations as required by the British Columbia Social Service Tax Act. T. failed to remit the tax collected and mingled it with its other assets. A secured creditor placed T. into receivership pursuant to its debenture and T. subsequently made an assignment in bankruptcy. The receiver sold T.'s assets and applied the full proceeds to reducing the secured creditor's indebtedness. The province claimed s. 18 of the Act created a statutory trust over the assets of T. equal to the amount of the sales tax collected but not remitted and that it had priority over the secured creditor and all other creditors. The chambers judge held the Act did not create a trust and the province did not have priority. The Court of Appeal held the Act did create a statutory trust, but that the province did not have priority as the Bankruptcy Act did not confer priority on such a trust. The province appealed. At issue was whether the statutorily created trust was a trust within s. 47 of the Bankruptcy Act or merely a Crown claim under s. 107(1)(j) of the Bankruptcy Act.

Held:

Appeal dismissed.

Per MCLACHLIN J. (LAMER, WILSON, LA FOREST, L'HEUREUX-DUBÉ JJ. concurring): The words of s. 47(a) of the Bankruptcy Act in their ordinary sense evidence the intention to permit removal from the distribution scheme established by the Bankruptcy Act of property which can be specifically identified, under general principles of trust law, as not belonging to the bankrupt. Section 107(1)(j) deals with claims, such as tax claims, not established under general principles of law but secured by the Crown's personal preference through legislation. This interpretation of s. 47(a) and s. 107(1)(j) avoids any conflict between the sections and conforms to the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation. Practical policy considerations also support this interpretation of the Bankruptcy Act.

Section 18 of the Social Service Tax Act deems a statutory trust at the moment the tax is collected. At that moment the trust property is identifiable, the trust meets the requirements for a trust under general principles of law and the money is exempt from distribution to creditors under s. 47(a). However, the identifiability is soon lost as the tax money becomes mingled with other money and is converted to other property so that it is no longer traceable and there is no longer a trust under general principles of law. Although s. 18(1)(b) of the Social Service Tax Act deems all tax collected to be held separate from the collector's other money, assets or estate, in reality the statutory trust bears little resemblance to a true trust after conversion of the property. It is for this reason that s. 18(2) provides for the unpaid tax to form a lien and charge on the entire assets of the collector.

Whether the province's interest under s. 18 is a trust within the meaning of s. 47(a) or a claim of the Crown under s. 107(1)(j) depends on the facts of a particular case. Here, no specific property impressed with a trust could be identified; accordingly, the province's claim could not fall under s. 47(a). As the province had a claim secured only by a charge or lien, s. 107(1)(j) would apply.

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Further, although provinces could define "trust" for matters within their own legislative competence, the definition of trust which is operative for purposes of exemption under the Bankruptcy Act, must be that of the federal Parliament.

Per CORY J. (dissenting): The sales tax money collected by a vendor never belongs to the vendor. The vendor is simply the conduit for payment of the sales tax to the province and, in every sense of the word, the vendor is a trustee of the money collected. The statutory requirements concerning the keeping of records and accounts by the vendor emphasize the trust nature of the arrangement between the vendor as tax collector and the province. While the provinces cannot create priorities under the Bankruptcy Act by their own legislation, the Bankruptcy Act does not prohibit a province from creating a deemed trust or lien. Section 18 does not create a priority, but protects those funds which at the moment they were paid were truly trust funds. It is also not certain that the validity of a trust must be determined exclusively on the basis of common law.

The statutory trust created by s. 18 is validly constituted as it conforms to the three certainties required of a trust in equity: that is, certainty of intention, certainty of subject matter and certainty of object. The statute establishes certainty of intention and object, and provides a clear formula for establishing the trust property. The traceability of the property is a separate issue and the statute provides for a deemed tracing remedy. This has the advantage over a privately constituted trust of recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage does not negate the trust or take it outside policies previously enunciated by the Supreme Court of Canada.

Since the sales tax collected never at any time became the property of the bankrupt, it fell within s. 47(a) and was not subject to distribution under s. 107(1). As there is no conflict between ss. 18, 47(a) and 107(1)(j), the doctrine of federal paramountcy of legislation does not apply and s. 18 prevails. The appeal should therefore be allowed.

Cases considered:

Considered by majority:

> Deloitte Haskins & Sells Ltd. v. W.C.B., [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, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81 -- applied
>
> Dep. Min. of Revenue (Que.) v. Rainville, [1980] 1 S.C.R. 35, (sub nom. Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville) 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. Bourgault's Estate v. Dep. Min. of Revenue of Que.) 30 N.R. 24 -- applied
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> Phoenix Paper Prod. Ltd., Re (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 3 D.L.R. (4th) 617, 1 O.A.C. 215 (C.A.) -- distinguished

Considered in dissent:

> Dauphin Plains Credit Union Ltd. v. Xyloid Indust. Ltd., [1980] 1 S.C.R. 1182, 33 C.B.R. (N.S.) 107, [1980] 3 W.W.R. 513, [1980] C.T.C. 247, (sub nom. Dauphin Plains Credit Union Ltd. v. R.) 80 D.T.C. 6123, 108 D.L.R. (3d) 257, 3 Man. R. (2d) 283, 31 N.R. 301 -- considered
>
> Deloitte Haskins & Sells Ltd. v. W.C.B., [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, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81 -- considered

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Dep. Min. of Revenue (Que.) v. Rainville, [1980] 1 S.C.R. 35, (sub nom. Re. Bourgault; Dep. Min. of Revenue of Que. v. Rainville) 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. Bourgault's Estate v. Dep. Min. of Revenue of Que.) 30 N.R. 24 -- considered

Deslauriers Const. Prod. Ltd., Re, [1970] 3 O.R. 599, (sub nom. A.G. Can. v. Perlmutter) 14 C.B.R. (N.S.) 197, 13 D.L.R. (3d) 551 (C.A.) -- considered

Diplock's Estate, Re; Diplock v. Wintle, [1948] Ch. 465, [1948] 2 All E.R. 318, affirmed (sub nom. Min. of Health v. Simpson) [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.) -- referred to

F.B.D.B. v. Que. (Comm. de la santé et de la securité du travail), [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308 -- referred to

John M.M. Troup Ltd. v. Royal Bank, [1962] S.C.R. 487, 3 C.B.R. (N.S.) 224, 34 D.L.R. (2d) 556 [Ont.] -- referred to

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 [Ont.] -- applied

Royal Trust Co. v. Tucker, [1982] 1 S.C.R. 250, 12 E.T.R. 257, 40 N.R. 361 [Que.] -- referred to

Statutes considered:

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

s. 67(a)

s. 136(1)(j)

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

s. 16.1

Business Corporations Act, S.A. 1981, c. B-15

s. 191(1)

Canada Pension Plan, R.S.C. 1985, c. C-8

s. 23(4)

Construction Lien Act, S.O. 1983, c. 6

s. 7

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Employment Standards Act, S.A. 1988, c. E-10.2

s. 113

Health Insurance Act, R.S.O. 1980, c. 197

s. 18

Insurance Act, R.S.A. 1980, c. I-5

s. 124(1)

Insurance Act, R.S.O. 1980, c. 218

s. 359

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

s. 58

Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5

s. 14

Revenue Act, R.S.B.C. 1979, c. 367 [repealed and substituted by the Financial Administration Act, S.B.C. 1981, c. 15, s. 71]

ss. 22-28 [now Pt. 7]

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

s. 5 [am. 1981, c. 29, s. 6]

s. 6 [am. 1981, c. 15, s. 159]

s. 8 [am. 1981, c. 29, s. 7]

s. 9 [am. 1981, c. 29, s. 8]

s. 10 [am. 1981, c. 29, s. 9]

s. 18 [am. 1980, c. 10, s. 119; c. 52, s. 4; 1982, c. 39, s. 7; 1983, c. 6, s. 32; 1985, c. 32, s. 6]

s. 27 [am. 1980, c. 52, s. 5; 1981, c. 29, s. 15; 1985, c. 32, s. 9; c. 75, s. 27]

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Regulations considered:

Alberta Health Care Insurance Act, R.S.A. 1980, c. A-24

Health Insurance Premiums Regulation, Alta. Reg. 217/81

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

Social Service Tax Act Regulations, B.C. Reg. 84/58 Div. 5

Authorities considered:

Driedger, Construction of Statutes, 2nd ed. (1983), p. 105.

Hardy, Crown Priority in Insolvency (1986), pp. 107-108.

Waters, Law of Trusts in Canada, 2nd ed. (1984), pp. 119-22, 1037ff.

Words and phrases considered:

"trust"

"property held by the bankrupt in trust for any other person"

"property of the bankrupt"

Annotation

The question whether a "deemed" trust created by the provincial legislature is a trust within the meaning of s. 67 of the Bankruptcy Act, R.S.C. 1985, c. B-3, or is entitled to priority only under the provisions of s. 136 of the Bankruptcy Act has been a matter of controversy between several provincial appellate courts. For instance, the courts in Nova Scotia (*Dir. of Lab. Standards (N.S.) v. Trustee in Bankruptcy* (1981), 38 C.B.R. (N.S.) 253, 126 D.L.R. (3d) 417, 47 N.S.R. (2d) 446, 90 A.P.R. 446 (C.A.)) and the appellate courts in British Columbia (*R. v. C.I.B.C.* (1983), 50 C.B.R. (N.S.) 116; *A.G. Can. v. Samson Belair Ltd.*, 55 C.B.R. (N.S.) 114, [1985] 3 W.W.R. 651, 61 B.C.L.R. 24, 17 D.L.R. (4th) 544, leave to appeal to S.C.C. refused 55 C.B.R. (N.S.) xxvii, 62 B.C.L.R. xli, 17 D.L.R. (4th) 544n, 61 N.R. 78) held that provincial "deemed" trusts fell within the provisions of s. 136 of the Bankruptcy Act, while the courts in Ontario, culminating with the case of *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 1 O.A.C. 215, 3 D.L.R. (4th) 617 (C.A.), held the opposite, namely, that a "deemed" statutory trust created by the province falls within s. 67 of the Bankruptcy Act and therefore has priority over other preferred creditors such as the trustee. The judgment of the Supreme Court of Canada in the case of *R. v. Henfrey Samson Belair Ltd.* now settles this question in an authoritative manner.

The law is now quite clear: the provisions of s. 67 of the Bankruptcy Act should be confined to trusts arising under general principles of law (namely, that the res must be identifiable or traceable) while s. 136 applies to claims not established by general law but secured "by Her Majesty's personal preference" through legislation. As the court stated, this conclusion is supported by the wording of ss. 67 and 136 of the Bankruptcy Act, by the jurisprudence of the Supreme Court of Canada, and by policy considerations.

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However, the court made it clear that at some stage the "deemed" trust may still meet the requirements for a trust under the principles of trust law because, at some point, the trust property may still be identifiable or traceable. But once the trust property is mingled with other funds and converted to other property, it can no longer be traced and at this point there is no longer a trust under general principles of law. In the latter case, s. 67 of the Bankruptcy Act no longer applies.

It is interesting that the court considered practical policy considerations when it stated at p. 19 as follows:

"The difficulties of extending [s. 67] to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly scheme for the distribution of the bankrupt's assets".

C.H. Morawetz, Q.C.

Appeal from judgment of B.C.C.A., 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 78, dismissing appeal from judgment of Meredith J., 61 C.B.R. (N.S.) 59, 5 B.C.L.R. (2d) 212, denying province's claimed priority over secured creditor in bankruptcy proceedings.

***Cory J.* (dissenting):**

1 I have read with great interest the compelling reasons of my colleague Justice McLachlin. Unfortunately I cannot agree that s. 47(*a*) [now s. 67(*a*)] of the Bankruptcy Act, R.S.C. 1970, c. B-3 [now R.S.C. 1985, c. B-3], does not apply in this case [appeal from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728]. If s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, creates a valid trust, then s. 47(*a*) of the Bankruptcy Act must apply. In order to determine the effect of s. 18 it may be helpful to consider the Social Service Tax Act as a whole.

Scheme of the British Columbia Social Service Tax Act

2 Registration under this Act is a condition precedent to carrying on a retail sales business in the province of British Columbia. Subject to certain irrelevant and minor exceptions, the Act provides that no one may sell "tangible personal property" in the province at a retail sale without being registered with the "commissioner", the provincial official appointed to administer the Act. It is sufficient to note that the term "tangible personal property" is given a very broad definition. With the approval of the minister, the commissioner may cancel or suspend the certificate of anyone found guilty of an offence under the Act, thus terminating the retail business. This is the ultimate form of control that the province exercises over those who collect the taxes assessed under the Act. In addition, the regulations passed pursuant to the Act provide for close scrutiny of the use of the registration certificates issued to vendors.

3 Pursuant to s. 5 of the Act, retail vendors are deemed to be agents of the minister for the purposes of levying and

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collecting sales tax. Section 6 provides that these agents are deemed to be tax collectors for the purposes of the Revenue Act, R.S.B.C. 1979, c. 367, and are made subject to the provisions of ss. 22 to 28 of that Act. Sections 22 to 28 prescribe the penalties for tax collectors who fail to render their accounts as required by the statute. Pursuant to s. 27, where a collector has received money belonging to the Crown in the right of the province and has failed to pay it to the province, the defaulting collector's property may be seized. As a quid pro quo s. 8 of the Social Service Tax Act provides that vendors are to receive remuneration for the service they provide to the government by collecting the tax.

4 Under ss. 9 and 10 of the Act every vendor is required to make returns and keep tax records in the form prescribed by the regulations and must keep a record of all purchases and sales. Division 5 of the Social Service Tax Act Regulations, B.C. Reg. 84/58, makes detailed provision for these returns and records. The regulations make clear that there is to be continuous supervision of sales tax collection. Separate monthly returns must be made for each place of business and the returns must be made no later than 15 days after the last day of each monthly period. The regulations provide in detail for the means of calculating upon each return the commission for each vendor on the collection of sales tax.

5 The requirements concerning the keeping of records and accounts emphasize the trust nature of the arrangement. They provide that books of accounts must contain distinct records of all (1) sales, (2) purchases, (3) non-taxable sales, (4) taxable sales, (5) amounts of tax collected, and (6) disposal of tax including commission taken. The records further stress that "all entries concerning the tax and such books of account, records and documents shall be kept *separate and distinguishable* from other entries made therein" (emphasis added). As well the tax must be shown as a separate item on all receipts given to purchases. Section 27 of the Act provides wide powers for the inspection of these records.

6 It is against this background that s. 18 of the Social Service Tax Act must be considered. That section provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> > (*a*) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
> >
> > (*b*) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> > (*a*) is collected and held in trust in accordance with subsection (1); or
> >
> > (*b*) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> > (*c*) the estate of the trustee under paragraph (*a*);

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(*d*) the person required to collect or remit the tax under paragraph (*b*); or

(*e*) the estate of the person required to collect or remit the tax under paragraph (*d*).

7 It can be seen that the moneys collected by a vendor such as Tops Pontiac Buick Ltd. ("Tops") as the tax collector of the sales tax never belongs to the vendor. The sales tax is payable by the purchaser who owes that sum to the province. The vendor never has any interest in those funds and is in every sense of the word a trustee of the funds collected for the sales tax. The vendor is simply the conduit for payment of the sales tax to the province. The province has not relied upon a requirement that separate bank accounts be kept by a vendor to protect its trust property. Rather, it has put into place a system of registration of all retail sales business and provided for a regulated means of record keeping and inspection. The system permits the government to specify precisely what money is due to it and to ascertain what is happening to its money on a monthly basis.

8 If the tax is not paid to the province then a vendor such as Tops must have stolen the funds, converted them to its own use or most charitably lost the funds for which it was responsible and for which it was accountable to the province.

9 From the point of view of fairness, there would seem to be no objection to the provincial government creating a lien or charge on the assets of the vendor for the amount of the sales tax (the trust funds) which the vendor was responsible for collecting and remitting to the province.

Does s. 18 create a valid trust?

10 The question may be phrased more precisely by asking: If, as the chambers judge found [61 C.B.R. (N.S.) 59 at 60, 5 B.C.L.R. (2d) 212], sales tax money "was misappropriated by Tops and mingled with its assets", does that put an end to the trust? It is said that the trust, although validly existing at the moment the funds were paid by the purchaser, ceases to exist or have any validity once the funds were mingled so that they could not be traced readily. To begin with, and somewhat simplistically, there is no prohibition in the Bankruptcy Act against the province creating a deemed trust or lien against the retail vendor's property for the extent of the sales tax, nor is there a conflict between s. 18 of the Social Service Tax Act and s. 47(*a*) and s. 107 [now s. 136] of the Bankruptcy Act. This is not a statutory ruse to evade the provisions of the Bankruptcy Act. It is simply an attempt to protect trust funds which are earmarked to be used for the public benefit and public use. Rather than insist that on each sale there be a separate payment to the province, the Act created a system which was in the best interest of retail purchases, retail vendors, the business community and the province as a whole. The Act does no more than protect funds which at the moment they were paid were truly trust funds. Nor am I sure that the validity of a trust must be determined exclusively on the basis of common law. It has been held by this court that the civil law of trust is not the same as that of common law: see *Royal Trust Co. v. Tucker*, [1982] 1 S.C.R. 250 at 261, 12 E.T.R. 257, 40 N.R. 361 [Que.].

11 There are a number of provincial statutory provisions which create trusts. This type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves. See for example, Pension Benefits Act, S.O. 1987, c. 35, s. 58; Insurance Act, R.S.O. 1980, c. 218, s. 359; Health Insurance Act, R.S.O. 1980, c. 197, s. 18; Builders' Lien Act, R.S.A. 1980, c. B-12, s. 16.1; Construction Lien Act, S.O. 1983, c. 6, s. 7; Business Corporations Act, S.A. 1981, c. B-15, s. 191(1); Employment Standards Act, S.A. 1988, c. E-10.2, s. 113; Insurance Act, R.S.A. 1980, c. I-5, s. 124(1); Real Estate Agents' Licensing Act, R.S.A. 1980, c. R-5, s. 14; and Health Insurance Premiums Regulation, Alta. Reg. 217/81.

12 This court has held that a province may, to further and protect a principle of social policy, create a statutory

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trust. In *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 at 494, 3 C.B.R. (N.S.) 224, 34 D.L.R. (2d) 556 [Ont.], the trust provisions of the Mechanics' Lien Act, R.S.O. 1950, c. 227 (now the Construction Lien Act), were found to be validly enacted. The statutory trusts referred to above provide needed protection for their beneficiaries and forward salutary social objectives which the provinces have jurisdiction to pursue.

13 Section 23(4) of the Canada Pension Plan, R.S.C. 1985, c. C-8, creates a statutory trust using language almost identical to s. 18 of the Social Service Tax Act. In *Re Deslauriers Const. Prod. Ltd.*, [1970] 3 O.R. 599, (sub nom. *A.G. Can. v. Perlmutter)* 14 C.B.R. (N.S.) 197, 13 D.L.R. (3d) 551 (C.A.), Gale C.J.O., for a unanimous court, noted that the Act deemed pension plan moneys to be kept separate and apart from the estate of the employer "whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate", and commented at p. 601:

> ... [these words] were inserted in the Act specifically for the purpose of taking the moneys equivalent to the deductions out of the estate of the bankrupt by the creation of a trust and making those moneys the property of the Minister.

From this he drew the following conclusion at pp. 602-603:

> In the *Canada Pension Plan* the fund is deemed to be property which does not comprise part of the bankruptcy at all, so that the Crown under that act is not a creditor, but is deemed to hold property which is not the property of the bankrupt.

Gale C.J.O.'s judgment was cited with approval by Pigeon J. writing for the majority in this court in *Dauphin Plains Credit Union Ltd. v. Xyloid Indust. Ltd.*, [1980] 1 S.C.R. 1182 at 1198, [1980] 3 W.W.R. 513, 33 C.B.R. (N.S.) 107, [1980] C.T.C. 247, (sub nom. *Dauphin Plains Credit Union Ltd. v. R.)* 80 D.T.C. 6123, 108 D.L.R. (3d) 257, 3 Man. R. (2d) 283, 31 N.R. 301, who stated: "I find the reasoning in *Deslauriers* wholly persuasive."

14 The provisions of s. 18 then should prevail unless they are in conflict with the provisions of the Bankruptcy Act. Sections 47 and 107 of the Act provide:

> 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.
>
> 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:
>
> (*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

15 The doctrine of federal paramountcy of legislation can only apply if there is actual conflict in the operation of the provincial and federal statutes. The principle was set forth in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at 191, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 [Ont.], by Dickson J., as he then was, in these words:

> 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

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> citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

16 In this case there is no conflict as the property which was subject to s. 18 of the Social Service Tax Act never at any time became the property of the bankrupt and is therefore not subject to distribution as the property of the bankrupt pursuant to s. 107 of the Bankruptcy Act. On a plain reading of s. 47 of the Bankruptcy Act there is no conflict created by the two statutes.

17 It is true that this court has in *Deloitte Haskins & Sells Ltd. v. W.C.B.*, [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, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81, recognized and emphasized that provinces cannot, by means of their own legislation, create priorities under the Bankruptcy Act. However, s. 18 has not created a priority. It did no more than give statutory recognition to a valid trust. It then eliminated the necessity of setting up a separate bank account for sales tax moneys and substituted a system of registration and record-keeping to control these funds which never at any time belonged to the vendor trustee. That latter step did not alter the existence of the valid trust of the funds collected from the purchases for payment to the province. I do not think that the decision in *Deloitte Haskins & Sells v. W.C.B.* can be taken to have altered the meaning of the words "property of the bankrupt" contained in s. 47 of the Bankruptcy Act.

18 This appears to be the opinion expressed by Anne E. Hardy, the author of Crown Priority in Insolvency (1986). She concedes that in the interest of consistency with *Deloitte Haskins & Sells v. W.C.B.*, the lien portion of the deemed trust section should probably be held to be ineffective on the bankruptcy of the trustee. Nonetheless at pp. 107-108 she sets out her position in this way:

> Thus, as a matter of interpretation, it is questionable to limit the scope of section 47(*a*) of the Bankruptcy Act to trusts which either exist in fact or do not benefit the Crown or a creditor whose claim is referred to in subsection 107(1) of the Act. Until the Act is amended to permit the courts to construe section 47 in this manner, they are probably not justified in taking this approach. The *Coopers & Lybrand* case therefore appears to be incorrectly decided. The judgments in most cases which have upheld statutory deemed trusts in bankruptcy and refused to rank the claims covered by them under subsection 107(1) of the Act are preferable.
>
> As argued above, trusts should generally be upheld on the bankruptcy of the trustee regardless of the manner in which they arise. It is possible, however, that certain types of deemed trust provisions should be held to be ineffective and that a valid trust would therefore not come into existence. Most of the trust cases decided since *Re Bourgault* have distinguished that case because it did not discuss trust provisions or the relationship between the trusts covered by section 47(*a*) and subsection 107(1) of the Bankruptcy Act. Some of these decisions dealt with trust provisions under which an amount deemed to be held in trust had been made a lien and charge on the assets of the trustee.

That view should, I think, prevail.

19 Furthermore, it seems that the trust although imposed by statute contains all the essential characteristics required of a trust. In order for a trust to be recognized in equity, there had to be three fundamental aspects complied with, that is to say, there had to be certainty of intention, certainty of subject matter and certainty of object. It is conceded that the statute establishes certainty of intention and of object. The respondent argues that there cannot be certainty of subject matter because the trust property cannot be identified and that, thus, trust in the traditional sense has not come into existence. However, here the subject matter was clearly identified at the moment of the sales by the vendor (Tops). The only issue that remained was whether or not the trust property could be identified so that such a trust could succeed in a tracing action. This subject matter was addressed by Professor Waters in the Law of

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Trusts in Canada, 2nd ed. (1984), at pp. 119- 22.

> When the courts say that there must be certainty of subject-matter, they mean that the property must either be described in the trust instrument, or there must be "a formula or method given for identifying it" ...
>
> In determining certainty, what the courts are looking for is the certainty of concept rather than whether it is too difficult to ascertain the subject-matter.

He distinguishes this question from the tracing issue:

> Initial ascertainability does not exist, so far as case law is concerned, unless specific property is earmarked as *the* trust property. Once this has occurred, and the trust has come into effect, the trust beneficiary can trace that property, whether it is converted into other forms, or, if money, it is mixed with other funds. [emphasis in original]

20 There can be no doubt that the statute provides a clear formula for establishing the trust property, that is to say, the sales tax, and therefore certainty of subject matter does indeed exist. The three certainties of intention, object and subject matter are thus established by statute. It could not be said that funds which were collected by Tops for sales tax became the property of Tops on the ground that the certainties required of a trust by equity do not exist as the statute has validly created them.

21 Neither could it be said that the statutory trust funds (the sales tax collected) became the property of the bankrupt Tops by reason of the fact that Tops improperly mingled those funds with its own property. In equity, funds mingled in this way remained impressed with their trust obligations. This left the beneficiary with two possible recourses against the trustee for its wrongful conduct. The beneficiary might either seek to recover the trust property by itself through the remedy of tracing or might choose instead to seek compensation for the loss by means of an action against the trustee.

22 Although there is some dispute as to whether at common law funds can be "followed" once they have been mixed with the defendant's own funds, in equity those moneys can be traced "either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund": *Re Diplock's Estate; Diplock v. Wintle*, [1948] Ch. 465 at 521, [1948] 2 All E.R. 318 at 347, per Lord Green M.R.; affirmed (sub nom. *Min. of Health v. Simpson)* [1951] A.C. 251, [1950] 2 All E.R. 1137 (H.L.). The limits to a tracing action are largely fixed by the difficulties and ultimately the prohibitive excuse of providing the necessary accounts: see D.W.M. Waters at p. 1037 ff. There is no reason why a statutorily constituted trust cannot provide an advantage over a privately constituted trust by recognizing the existence of the trust in property held by the trustee without requiring the beneficiary to undertake the often inordinately expensive action of tracing commingled funds. This advantage should not deprive the statutory trust property of its trust character or take it outside the policies articulated in *Dep. Min. of Revenue (Que.) v. Rainville* , [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24; *Deloitte Haskins & Sells v. W.C.B.*, supra; and *F.B.D.B. v. Que. (Comm. de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308. It would thus seem that the statutory trust complies with the requirements of a valid trust that would be recognized in equity.

23 If as stated in *Dep. Min. of Revenue (Que.) v. Rainville* mechanics' liens or construction liens may be recognized, although it would be impossible to trace the funds of the subcontractors in the commingled accounts of the general contractor, so too should the statutory trust pertaining to sales tax be recognized.

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75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

24 Nor will such a conclusion create practical problems. If the proposed trustee in bankruptcy is faced with the question as to whether or not the assets are subject to a trust, an application may be made to the court to determine that issue at the outset of the proceedings. Further, if there is a dispute between those claiming a trust interest it can be determined on the basis of priority predicated upon the date on which the trust arose.

Disposition

25 I conclude therefore that the trust described in s. 18 of the British Columbia Social Service Tax Act is not in any sense a claim against the property of the bankrupt so as to conflict with the policy underlying s. 107(1) of the Bankruptcy Act as that policy has been expounded in *Dep. Min. v. Rainville, Deloitte Haskins & Sells v. W.C.B.*, and *F.B.D.B. v. Que. (Comm. de la santé et de la sécuritié du travail)*, for the following reasons:

> (a) The sums constituting the trust were never the property of the bankrupt, but were transferred from purchases of vehicles to the provincial Crown, for whom Tops acted as trustee, in satisfaction of an obligation incurred by those purchases;
>
> (b) The trust was validly constituted in that it complied with the three certainties required of trusts by the law of equity: s. 18 of the Social Service Tax Act does not dispense with those certainties, but conforms to them, in the same way that a contractual trust instrument must;
>
> (c) The only relevant distinction between this statutory trust and a contractual express trust lies in the deemed tracing remedy provided by the statute. The existence of this remedy:
>
>> (i) does not negate the trusts;
>>
>> (ii) is largely facilitative and thus does not take the trust out of the policy enunciated in *Re Bourgault, Deloitte Haskins & Sells* and *F.B.D.B.*;
>
> (d) The trust therefore properly falls within s. 47(*a*) of the Bankruptcy Act and outside the property of the bankrupt, as that term is to be understood in light of the policy underlying s. 107(1) of the Act.

26 I would therefore answer the constitutional question as follows:

> Are the provisions of s. 18(1) of the *Social Service Tax Act*, R.S.B.C. 1979, c. 388, as amended, inoperative by reason of being in conflict with s. 107(1)(*j*) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3?

Answer: No.

27 I would allow the appeal, set aside the decision of the Court of Appeal and that of the chambers judge and direct that the special case be answered "the defendant was not correct in granting the Canadian Imperial Bank of Commerce priority over the statutory trust of the plaintiff."

***McLachlin J. (Lamer, Wilson, La Forest, L'Heureux-Dubé* and *Gonthier JJ.* concurring)::**

28 The issue on this appeal [from 65 C.B.R. (N.S.) 24, [1987] 4 W.W.R. 673, 13 B.C.L.R. (2d) 346, 40 D.L.R. (4th) 728] is whether the statutory trust created by s. 18 of the British Columbia Social Service Tax Act, R.S.B.C. 1979, c. 388, gives the province priority over other creditors under the Bankruptcy Act, R.S.C. 1970, c. B-3 [now

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R.S.C. 1985, c. B-3].

29 Tops Pontiac Buick Ltd. ("Tops") collected sales tax for the provincial government in the course of its business operations, as it was required to do by the Social Service Tax Act. Tops mingled the tax collected with its other assets. When the Canadian Imperial Bank of Commerce placed Tops in receivership pursuant to its debenture and Tops made an assignment in bankruptcy, the receiver sold the assets of Tops and applied the full proceeds in reduction of the indebtedness of the bank.

30 The province contends that the Social Service Tax Act creates statutory trust over the assets of Tops equal to the amount of the sales tax collected but not remitted ($58,763.23), and that it has priority over the bank and all other creditors for this amount.

31 The chambers judge held that the Social Service Tax Act did not create a trust and that the province did not have priority. On appeal the receiver conceded that the legislation created a statutory trust, but contended that the chambers judge was correct in ruling that the province did not have priority because the Bankruptcy Act did not confer priority on such a trust. The British Columbia Court of Appeal accepted this submission. The province now appeals to this court.

32 The section of the Social Service Tax Act which the province contends gives it priority provides:

> 18. (1) Where a person collects an amount of tax under this Act
>
> > (*a*) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
> >
> > (*b*) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (2) The amount of taxes that, under this Act,
>
> > (*a*) is collected and held in trust in accordance with subsection (1); or
> >
> > (*b*) is required to be collected and remitted by a vendor or lessor
>
> forms a lien and charge on the entire assets of
>
> > (*c*) the estate of the trustee under paragraph (*a*);
> >
> > (*d*) the person required to collect or remit the tax under paragraph (*b*); or
> >
> > (*e*) the estate of the person required to collect or remit the tax under paragraph (*d*).

33 The province argues that s. 18(1) creates a trust within s. 47(*a*) [now s. 67(*a*)] of the Bankruptcy Act, which provides:

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75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

> 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.

34 The respondents, on the other hand, submit that the deemed statutory trust created by s. 18 of the Social Service Tax Act is not a trust within s. 47 of the Bankruptcy Act, in that it does not possess the attributes of a true trust. They submit that the province's claim to the tax money is in fact a debt falling under s. 107(1)(*j*) [now s. 136(1)(*j*)] of the Bankruptcy Act, the priority to which falls to be determined according to the priorities established by s. 107.

> 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:
>
> (*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

Discussion

35 The issue may be characterized as follows. Section 47(*a*) of the Bankruptcy Act exempts trust property in the hands of the bankrupt from distribution to creditors, giving trust claimants absolute priority. Section 107(1) establishes priorities between creditors on distribution; s. 107(1)(*j*) ranks Crown claims last. Section 18 of the Social Service Tax Act creates a statutory trust which lacks the essential characteristics of a trust, namely, that the property impressed with the trust be identifiable or traceable. The question is whether the statutory trust created by the provincial legislation is a trust within s. 47(*a*) of the Bankruptcy Act or a mere Crown claim under s. 107(1)(*j*).

36 In my opinion, the answer to this question lies in the construction of the relevant provisions of the Bankruptcy Act and the Social Service Tax Act.

37 In approaching this task, I take as my guide the following passage from Driedger, Construction of Statutes, 2nd ed. (1983), at p. 105:

> The decisions ... indicate that the provisions of an enactment relevant to a particular case are to be read in the following way:
>
> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
>
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

38 With these principles in mind, I turn to the construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act. The question which arises under s. 47(*a*) of the Act concerns the meaning of the phrase "property held by the bankrupt in trust for any other person". Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the

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bankrupt before distribution under the Bankruptcy Act because, in equity, it belongs to another person. The intention of Parliament in enacting s. 47(*a*), then, was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the Bankruptcy Act.

39 Section 107(1)(*j*), on the other hand, has been held to deal not with rights conferred by general law, but with the statutorily created claims of federal and provincial tax collectors. The purpose of s. 107(1)(*j*) was discussed by this court in *Dep. Min. of Revenue (Que.) v. Rainville*, [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Dep. Min. of Revenue of Que. v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgault's Estate v. Dep. Min. of Revenue of Que.)* 30 N.R. 24. Pigeon J., speaking for the majority, stated at p. 45:

> There is no need to consider the scope of the expression "claims of the Crown". It is quite clear that this applies to claims of provincial governments for taxes and I think it is obvious that it does not include claims not secured by Her Majesty's personal preference, but by a privilege which may be obtained by anyone under general rules of law, such as a vendor's or a builder's privilege.

40 If s. 47(*a*) and s. 107(1)(*j*) are read in this way, no conflict arises between them. If a trust claim is established under general principles of law, then the property subject to the trust is removed from the general distribution by reason of s. 47(*a*). Following the reasoning of Pigeon J. in *Rainville*, such a claim would not fall under s. 107(1)(*j*) because it is valid under general principles of law and is not a claim secured by the Crown's personal preference.

41 This construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act conforms with the principle that provinces cannot create priorities under the Bankruptcy Act by their own legislation, a principle affirmed by this court in *Deloitte, Haskins & Sells Ltd. v. W.C.B.*, [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, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81. As Wilson J. stated at p. 806:

> ... the issue in *Re Bourgault* and *Re Black Forest Restaurant Ltd.* was not whether a proprietary interest has been created under the relevant provincial legislation. It was whether provincial legislation, even if it did create a proprietary interest, could defeat the scheme of distribution under s. 107(1) of the *Bankruptcy Act*. These cases held that it could not, that while the provincial legislation could validly secure debts on the property of the debtor in a non-bankruptcy situation, once bankruptcy occurred s. 107(1) determined the status and priority of the claims specifically dealt with in the section. It was not open to the claimant in bankruptcy to say: By virtue of the applicable provincial legislation I am a secured creditor within the meaning of the opening words of s. 107(1) of the *Bankruptcy Act* and therefore the priority accorded my claim under the relevant paragraph of s. 107(1) does not apply to me. In effect, this is the position adopted by the Court of Appeal and advanced before us by the respondent. It cannot be supported as a matter of statutory interpretation of s. 107(1) since, if the section were to be read in this way, it would have effect of permitting the provinces to determine priorities on a bankruptcy, a matter within exclusive federal jurisdiction.

While *Deloitte, Haskins & Sells Ltd. v. W.C.B.* was concerned with provincial legislation purporting to give the province the status of a secured creditor for purposes of the Bankruptcy Act, the same reasoning applies in the case at bar.

42 To interpret s. 47(*a*) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the Bankruptcy Act and to invite a differential scheme of distribution on bankruptcy from province to province.

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43 Practical policy considerations also recommended this interpretation of the Bankruptcy Act. The difficulties of extending s. 47(*a*) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly scheme for the distribution of the bankrupt's assets.

44 In summary, I am of the view that s. 47(*a*) should be confined to trusts arising under general principles of law, while s. 107(1)(*j*) should be confined to claims such as tax claims not established by general law but secured "by Her Majesty's personal preference" through legislation. This conclusion, in my opinion, is supported by the wording of the sections in question, by the jurisprudence of this court and by the policy considerations to which I have alluded.

45 I turn next to s. 18 of the Social Service Tax Act and the nature of the legal interests created by it. At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law. In an attempt to meet this problem, s. 18(1)(*b*) states that tax collected shall be deemed to be held separate from and form no part of the collector's money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust. There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

46 Applying these observations on s. 18 of the Social Service Tax Act to the construction of ss. 47(*a*) and 107(1)(*j*) of the Bankruptcy Act which I have earlier adopted, the answer to the question of whether the province's interest under s. 18 is a "trust" under s. 47(*a*) or a "claim of the Crown" under s. 107(1)(*j*) depends on the facts of the particular case. If the money collected for tax is identifiable or traceable, then the true state of affairs conforms with the ordinary meaning of "trust" and the money is exempt from distribution to creditors by reason of 47(*a*). If, on the other hand, the money has been converted to other property and cannot be traced, there is no "property held ... in trust" under s. 47(*a*). The province has a claim secured only by a charge or lien, and s. 107(1)(*j*) applies.

47 In the case at bar, no specific property impressed with a trust can be identified. It follows that s. 47(*a*) of the Bankruptcy Act should not be construed as extending to the province's claim in this case.

48 The province, however, argues that it is open to it to define "trust" however it pleases, property and civil rights being matters within provincial competence. The short answer to this submission is that the definition of trust which is operative for purposes of exemption under the Bankruptcy Act must be that of the federal Parliament, not the provincial legislatures. The provinces may define "trust" as they choose for matters within their own legislative competence, but they cannot dictate to Parliament how it should be defined for purposes of the Bankruptcy Act: *Deloitte, Haskins & Sells Ltd. v. W.C.B.*

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75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 97 N.R. 61, [1989] 5 W.W.R. 577, 38 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, [1989] 1 T.S.T. 2164, 2 T.C.T. 4263, J.E. 89-1098

49 Nor does the argument that the tax money remains the property of the Crown throughout withstand scrutiny. If that were the case, there would be no need for the lien and charge in the Crown's favour created by s. 18(2) of the Social Service Tax Act. The province has a trust inter est and hence property in the tax funds so long as they can be identified or traced. But once they lose that character, any common law or equitable property interest disappears. The province is left with a statutory deemed trust which does not give it the same property interest a common law trust would, supplemented by a lien and charge over all the bankrupt's property under s. 18(2).

50 The province relies on *Re Phoenix Paper Prod. Ltd.* (1983), 44 O.R. (2d) 225, 48 C.B.R. (N.S.) 113, 3 D.L.R. (4th) 617, 1 O.A.C. 215, where the Ontario Court of Appeal held that accrued vacation pay mixed with other assets of a bankrupt constituted a trust under s. 47(*a*) of the Bankruptcy Act. As the Court of Appeal in this case pointed out, the Ontario Court of Appeal in *Re Phoenix Paper Prod. Ltd.*, in considering the two divergent lines of authority presented to it, did not have the advantage of considering what was said in *Deloitte, Haskins & Sells v. W.C.B.*, and the affirmation in that case of the line of authority which the Ontario Court of Appeal rejected.

51 The appellant raised a second question in the alternative, namely:

> If the Province is divested of its trust property by reason of s. 18(1) being in conflict with s. 107(1)(*j*) of the *Bankruptcy Act*, does [that] property devolve to the secured creditor [the Bank] or is it distributed to unsecured creditors pursuant to s. 107 of the *Bankruptcy Act*?

This question was not raised in the courts below, nor on the application for leave to appeal. It concerns parties who were not present on the appeal. For these reasons, I would decline to consider it.

Conclusion

52 For the reasons stated, I conclude that s. 47(*a*) of the Bankruptcy Act does not apply in this case and the priority of the province's claim is governed by s. 107(1)(*j*) of the Act. I would decline to answer the alternative question posed by the appellants.

53 I would dismiss the appeal, with costs.

Appeal dismissed.

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TAB 2

[2006] W.D.F.L. 3681, 56 C.C.P.B. 1, 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th)
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2006 CarswellOnt 6292

Ivaco Inc., Re

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

AND IN THE MATTER OF A Plan or Plans of Compromise or Arrangement of Ivaco Inc. and the Applicants listed in Schedule "A"

Ontario Court of Appeal

J. Laskin, M. Rosenberg, J. Simmons JJ.A.

Heard: February 22, 2006
Judgment: October 17, 2006
Docket: CA C44455

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Proceedings: affirming *Ivaco Inc., Re* (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List])

Counsel: Frederick L. Myers, Jason Wadden for Appellant, Superintendent of Finance Services (Ontario)

Andrew Hatnay for Respondent, Quebec Pension Committee of Ivaco Inc.

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

Dan V. MacDonald for Respondent, Bank of Nova Scotia

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

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

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

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Civil Practice and Procedure

Bankruptcy and insolvency --- Property of bankrupt -- Trust property -- General principles

Pension funds -- I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees -- I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") -- To facilitate restructuring of I Group, order was issued suspending unpaid past-service

payments and special contributions I Group had been making to certain underfunded pension plans -- Restructuring was unsuccessful -- I Group's assets were sold -- Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account -- Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy -- Stay was lifted, and bankruptcy petitions were allowed to proceed -- Superintendent appealed from dismissal of its motion -- Appeal dismissed -- Motions judge did not err in law in refusing to order immediate payment of amount of deemed trusts under PBA or in refusing to segregate that amount -- Combination of wording of s. 57 of PBA, paragraph 4 of pension stay order, and limited role of Monitor refuted Superintendent's argument that funds should have been segregated -- CCAA itself did not require motions judge to execute deemed trusts -- Because Federal legislative regime under CCAA and Bankruptcy and Insolvency Act determines claims of creditors of insolvent company, if rights of pension claimants are to be given greater priority, Parliament, not courts, must do so.

Pensions --- Payment of pension -- Bankruptcy or insolvency of employer -- Registered plans

I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees -- I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") -- To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans -- Restructuring was unsuccessful -- I Group's assets were sold -- Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account -- Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy -- Stay was lifted, and bankruptcy petitions were allowed to proceed -- Superintendent appealed from dismissal of its motion -- Appeal dismissed -- Motions judge did not err in law in refusing to order immediate payment of amount of deemed trusts under PBA or in refusing to segregate that amount -- Combination of wording of s. 57 of PBA, paragraph 4 of pension stay order, and limited role of Monitor refuted Superintendent's argument that funds should have been segregated -- Because Federal legislative regime under CCAA and Bankruptcy and Insolvency Act determines claims of creditors of insolvent company, if rights of pension claimants are to be given greater priority, Parliament, not courts, must do so -- Motions judge did not err in exercising his discretion to lift stay under CCAA and permit bankruptcy petition to proceed -- Superintendent's unfairness argument was not accepted.

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders -- Stay of petition -- General principles

I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees -- I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") -- To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans -- Restructuring was unsuccessful -- I Group's assets were sold -- Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account -- Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy -- Stay was lifted, and bankruptcy petitions were allowed to proceed -- Superintendent appealed from dismissal of its motion -- Appeal dismissed -- Motions judge did not err in exercising his discretion to lift stay under CCAA and permit bankruptcy petition to proceed -- Motion judge's order lifting stay was discretionary order, and appellate review of discretionary order under CCAA is justified only for error in principle or unreasonable exercise of discretion -- Superintendent's unfairness argument was not accepted --

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Numerous conditions supported motions judge's decision to lift stay and permit bankruptcy petitions to proceed -- Motions judge would have gone beyond his role as referee in CCAA proceedings if he had given effect to Superintendent's claim.

Bankruptcy and insolvency --- Practice and procedure in courts -- Orders -- Miscellaneous issues

I Inc. and related companies, collectively I Group, had established various registered pension plans for their employees -- I Group became insolvent in 2003, and obtained protection under Companies' Creditors Arrangement Act ("CCAA") -- To facilitate restructuring of I Group, order was issued suspending unpaid past-service payments and special contributions I Group had been making to certain underfunded pension plans -- Restructuring was unsuccessful and I Group's assets were sold -- Superintendent brought unsuccessful motion for order directing that portions of sale proceeds be used to satisfy unpaid pension obligations, which companies are deemed to hold in trust for beneficiaries of pension plans under Pension Benefits Act ("PBA") or, alternatively, for order segregating this amount in separate account -- Some of I Group's financial creditors brought partially successful motions for order lifting stay under CCAA and petitioning I Group into bankruptcy -- Stay was lifted, and bankruptcy petitions were allowed to proceed -- Motions judge made ancillary order to facilitate bankruptcy petitions, which ordered that head offices of two I Group companies be transferred from cities in Quebec to Toronto -- Superintendent appealed from ancillary order on basis that motions judge lacked jurisdiction under CCAA to make such order or, alternatively, improperly exercised his discretion in doing so -- Appeal dismissed -- Motions judge did not err in ordering that head offices of companies in question be transferred from Quebec to Toronto -- Argument that CCAA did not give motions judge jurisdiction to order transfer was accepted, but it was also accepted that transfer was not made to facilitate CCAA restructuring; instead, it was made to facilitate future bankruptcy proceedings -- Nonetheless, motions judge did not need to resort to CCAA because he had express authority to order transfer under Canada Business Corporations Act ("CBCA") -- Section 191 of CBCA gives court express authority to order transfer of head office of company that is subject to order under CCAA -- Motions judge properly exercised his discretion in ordering transfer.

Cases considered by *J. Laskin J.A.*:

Abraham v. Canadian Admiral Corp. (Receiver of) (1998), 2 C.B.R. (4th) 243, 1998 CarswellOnt 1475, 158 D.L.R. (4th) 65, (sub nom. *Abraham v. Canadian Admiral Corp. (Receivership)*) 109 O.A.C. 36, 39 O.R. (3d) 176, 37 C.C.E.L. (2d) 276, 19 C.C.P.B. 1, 13 P.P.S.A.C. (2d) 334 (Ont. C.A.) -- referred to

Air Canada, Re (2003), 43 C.B.R. (4th) 1, 66 O.R. (3d) 257, 229 D.L.R. (4th) 687, 174 O.A.C. 201, 2003 CarswellOnt 2925 (Ont. C.A.) -- referred to

Algoma Steel Inc. v. Union Gas Ltd. (2003), 169 O.A.C. 89, 39 C.B.R. (4th) 5, 2003 CarswellOnt 115, 63 O.R. (3d) 78 (Ont. C.A.) -- referred to

Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 36 B.C.L.R. (2d) 118, 73 C.B.R. (N.S.) 273, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623, 1989 CarswellBC 337 (B.C. C.A.) -- referred to

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) -- referred to

British Columbia v. Henfrey Samson Belair Ltd. (1989), 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, 1989 CarswellBC 351 (S.C.C.) -- considered

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Dallas/North Group Inc., Re (1999), 17 C.B.R. (4th) 56, 1999 CarswellOnt 4720, 46 O.R. (3d) 602 (Ont. Gen. Div.) -- referred to

General Chemical Canada Ltd., Re (2005), 51 C.C.P.B. 297, 2005 CarswellOnt 7306, C.E.B. & P.G.R. 8179 (Ont. S.C.J.) -- considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), (sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, 74 O.R. (3d) 382 (Ont. C.A.) -- distinguished

Harrop of Milton Inc., Re (1979), 1979 CarswellOnt 185, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 22 O.R. (2d) 239 (Ont. Bktcy.) -- referred to

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

Ivaco Inc., Re (2004), 2004 CarswellOnt 3561 (Ont. S.C.J. [Commercial List]) -- referred to

Lambert, Re (2002), (sub nom. *Lambert (Bankrupt), Re)* 162 O.A.C. 132, 216 D.L.R. (4th) 330, 2002 CarswellOnt 2659, 36 C.B.R. (4th) 256, (sub nom. *Buth-na-bodhiaga Inc. v. Lambert)* 60 O.R. (3d) 787 (Ont. C.A.) -- referred to

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

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) -- distinguished

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) -- distinguished

United Maritime Fishermen Co-op., Re (1988), 68 C.B.R. (N.S.) 170, 1988 CarswellNB 20, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (N.B. Q.B.) -- referred to

Statutes considered:

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

s. 427 -- referred to

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

Generally -- referred to

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s. 11(3) -- referred to

s. 11(4) -- referred to

s. 43(5) -- referred to

s. 43(7) -- referred to

s. 67(1)(a) -- referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 109(1) -- referred to

s. 173 -- referred to

s. 173(1)(b) -- considered

s. 191 -- considered

s. 191(1) -- considered

s. 191(1)(c) -- considered

s. 191(2) -- considered

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

Generally -- considered

s. 2 "debtor company" -- referred to

s. 11 -- referred to

s. 11.7(1) [en. 1997, c. 12, s. 124] -- referred to

s. 11.7(3) [en. 1997, c. 12, s. 124] -- referred to

s. 13 -- referred to

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

Generally -- referred to

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

Generally -- referred to

s. 57 -- referred to

s. 57(3) -- considered

s. 57(4) -- considered

s. 57(5) -- considered

Wage Earner Protection Program Act, S.C. 2005, c. 47

Generally -- referred to

Regulations considered:

Truck Transportation Act, R.S.O. 1990, c. T.22

Load Brokers, O. Reg. 556/92

s. 15 -- referred to

s. 15(2) -- referred to

APPEAL by Superintendent from judgment, reported at *Ivaco Inc., Re* (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]), dismissing Superintendent's motion for order.

***J. Laskin J.A.*:**

A. Introduction

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

2 Ivaco and its related group of companies (collectively "the Companies") became insolvent in 2003. In September 2003, the Companies sought and obtained court-ordered protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). All claims of creditors were stayed. A later order stayed the Companies'

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obligation to pay the outstanding past service contributions and special payments to the non-union pension plans. (Past service contributions are monies due to fund benefits or benefit enhancements for pension members' past service; special payments are extraordinary payments made because a pension plan is underfunded).

3 The main purpose of CCAA proceedings is to facilitate the restructuring of an insolvent company so that it may stay in business. The Companies, however, were unable to restructure. In late 2004, virtually all of their assets were sold. All that remains is a pool of money: the proceeds of sale. All that remains to be done is to distribute this pool of money among the creditors.

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

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

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

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

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

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

B. Relevant Facts and Chronology

a) The Companies

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

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

b) The non-union pension plans

12 The Companies had both a unionized and non-unionized workforce. They established various registered pension plans for their employees. These included four non-union plans: the Ivaco Salaried Plan, which is registered in Quebec and has both Quebec and Ontario members, the Designated Employees Plan, the Ingersoll Plan and the Docap Plan, all registered in Ontario.

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

c) The initial stay under the CCAA

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

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

d) The pension stay order

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

17 Early in the CCAA proceedings, the Monitor concluded that the Companies would jeopardize their ability to restructure if they were required to continue making past service contributions and special payments. Because of the magnitude of these payments, the creditors would not agree to permit the DIP (debtor in possession) loan to be used for funding the pension plans. In their view, and in the view of the Monitor, doing so would imperil the possibility of restructuring. Relying on the Monitor's opinion, the Companies sought, and on November 28, 2003, were granted a pension stay order.

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

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

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

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

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

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

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

e) The sale to Heico

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

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

24 The motions judge made two orders -- on August 18, 2004 [2004 CarswellOnt 3561 (Ont. S.C.J. [Commercial List])] and November 30, 2004 -- vesting the assets in the purchaser. These orders expressly preserved all claims that might have been made against the assets by providing that these claims could be made against the sale proceeds. In accordance with these orders, the Monitor is holding the sale proceeds in various trust accounts.

25 In December 2004, Ivaco, IRM and Ifastgroupe wound-up their non-union pension plans. Under the PBA, they

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are obligated to fund the wind-up liabilities of these plans.

f) The pension claims

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

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

g) The claims of the financial creditors

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

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

30 The National Bank lent money to Ivaco, Ifastgroupe and Docap. As of March 2005 it had a secured claim against Ivaco for $17 million,[FN1] and against Docap for $55,622 U.S. and $4.2 million Canadian. It also had an unsecured claim against Ifastgroupe for $45.5 million Canadian. Ifastgoupe is also indebted to La Caisse for $14.9 million.

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

C. Analysis

a) What is in issue on this appeal

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

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

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> 2) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed, without protecting the claims of the pension beneficiaries?
>
> 3) Did the motions judge err in law or in the exercise of his discretion by ordering the transfer of Ivaco's and Ifastgroupe's head offices from Quebec to Toronto?

b) What is not in issue on this appeal

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

34 On my view of the appeal, the first of these issues does not have to be resolved. It may become relevant at the bankruptcy hearing, and, if so, should be dealt with by the bankruptcy judge. See *Abraham v. Canadian Admiral Corp. (Receiver of)* (1998), 39 O.R. (3d) 176 (Ont. C.A.). The second and third issues, I assume, will be dealt with at the hearing of the bankruptcy petitions. Admittedly, the motions judge made some observations on these two issues. However, he also said, at para. 20 of his reasons, that he was not deciding either one:

> However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

35 In their written and oral submissions, the Superintendent and the QPC argued that some of the motions judge's general observations on these issues were wrong. I do not propose to consider these arguments because, as the motions judge recognized, they should be addressed at the hearing of the bankruptcy petitions. Instead, I will make a few brief observations of my own.

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

37 The motions judge observed, at para. 14, that the discretion to refuse to make a bankruptcy order under s. 43(7) typically is exercised in two categories of cases: where the petitioner has an ulterior motive in seeking the order, or where the order would not serve any meaningful purpose. This observation reflects the current state of the case law under s. 43(7). See for example *Dallas/North Group Inc., Re* (1999), 46 O.R. (3d) 602 (Ont. Gen. Div.); *Lambert, Re* (2002), 60 O.R. (3d) 787 (Ont. C.A.). Although the motions judge added that the Superintendent's claim does not appear to come within either category, he left the final determination of that question for the bankruptcy judge.

38 The motions judge also observed, at para. 11 of his reasons, that a provincially created deemed trust does not by that fact alone enjoy priority under the BIA. This is not a contentious proposition. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute. See for example *British Columbia v. Henfrey Samson Belair Ltd.* , [1989] 2 S.C.R. 24 (S.C.C.); *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). In-

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deed, it is this jurisprudence that undoubtedly prompted the Superintendent's original motion and appeal to this court.

39 The motions judge also correctly observed, at para. 11 of his reasons, that a provincial deemed trust will retained its priority in bankruptcy only if it also meets the three attributes -- the three certainties -- of a common law trust: certainty of intent; certainty of subject matter; and certainty of object. Only a trust that has these three attributes is a "true trust" that will be exempt from the bankrupt's estate under s. 67(1)(a) of the BIA. See for example *Henfrey Sampson, supra*. Whether the Superintendent can establish a true trust for unpaid past service contributions, even though the proceeds of the Heico sale have been commingled, will be decided at the bankruptcy hearing.

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

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

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

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

43 The deemed trusts for unpaid past service and special contributions are found in ss. 57(3) and (4) of the PBA. Subsection (3) is the basic provision that creates a deemed trust for unpaid employer contributions. Subsection (4) stipulates that on the wind up of a pension plan, employer contributions accrued but not yet due because of the timing of the wind up are also deemed to be held in trust:

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

44 At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.), Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act, 1987*, S.O. 1987, c.35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco Ltd.* is correct, but I do not need to resolve the issue on this appeal.

45 Under s. 57(5) of the PBA the plan administrator has a lien and charge on the assets of the employer for the

amount of any deemed trust. The lien and charge permit the administrator to enforce the deemed trust.

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

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

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

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

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

50 Equally important, the Monitor does not owe a fiduciary duty to the pension beneficiaries. The Superintendent's attempt to impose an obligation on the Monitor to segregate the contributions to the non-union plans depends at least on establishing that the Monitor acts as a fiduciary of the employees in those plans. Both the role of the Monitor and the initial stay order preclude the Superintendent's assertion.

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

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

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

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[Emphasis added].

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

53 Therefore, the combination of the wording of s. 57 of the PBA, para. 4 of the pension stay order and the limited role of the Monitor, refute the Superintendent's segregation argument. The Superintendent, however, submits that two cases, the decision of this court in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382 (Ont. C.A.) [hereinafter *TCT Logistics*] and an earlier decision of the motions judge in *Usarco Ltd., supra*, support the argument for segregation. In my view, both cases are distinguishable.

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

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

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

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

58 In *Usarco Ltd., supra*, at para. 16, Farley J. commented that the deemed trust provisions of the PBA "implied a fiduciary obligation on the part of Usarco", and that "a trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation". These comments do not apply to this case. The Monitor here, unlike the trustee in bankruptcy in *Usarco Ltd.*, did not step into the shoes of the debtor. Thus, *Usarco Ltd.* does not assist the Superintendent.

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

60 The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of

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the sale proceeds. See for example *United Maritime Fishermen Co-op., Re* (1988), 68 C.B.R. (N.S.) 170 (N.B. Q.B.), at 173.

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

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

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

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

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

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

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

68 Recently in *General Chemical Canada Ltd., Re* (Ont. S.C.J.), Campbell J. relied on this distinction, followed

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the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:

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

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

69 Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so. Last year it passed the *Wage Earner Protection Program Act*, S.C. 2005 c.47. That Act would amend the BIA and give special priority to unpaid pension contributions of a bankrupt employer. This statute, however, has not been proclaimed in force. That it was passed perhaps shows that under the existing legislative regime, claims like that of the Superintendent must fail. I would reject this ground of appeal.

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

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

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

71 Appellate review of a discretionary order under the CCAA is limited. See *Air Canada, Re* (2003), 66 O.R. (3d) 257 (Ont. C.A.) at para. 25; *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126 (Ont. C.A.) at para. 23; *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 16. Appellate intervention is justified only for an error in principle or the unreasonable exercise of discretion. The Superintendent submits that the motions judge exercised his discretion improperly -- on a wrong principle -- because he ignored the "unfair and prejudicial" effects of his order on the Companies' most vulnerable class of creditors: the pension beneficiaries. I disagree.

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

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

> [O]ther stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due.

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

74 Second, the Superintendent contends that the motions judge's order undermined his earlier pension stay order, which had expressly preserved the pension beneficiaries' deemed trust rights. I do not accept this contention. Although the pension stay order did not take away these deemed trust rights, it did not provide that the deemed trusts would be paid out of any sale proceeds. Instead, para. 4 of the pension stay order provided that the Companies would not incur any obligation because of their failure to pay past service contributions during the stay period. Moreover, even though the Superintendent and the QPC knew that a petition for bankruptcy (by the Bank of Nova Scotia) was pending when they agreed to the pension stay order, they did not ask that the order be conditional on payment of the amount of the deemed trusts when the stay was lifted.

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

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

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

- The petitioning creditors have met the technical requirements for bankruptcy. And their desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order. See for example *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C. C.A.), at 627, 630-631; *Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bktcy.), at 244- 245.

- The Superintendent and the QPC agreed to the CCAA process. They recognized that it benefitted the pension claimants. Thus, they did not oppose either the pension stay order or the sale to Heico. They did not ask to have the deemed trusts satisfied or an amount to satisfy them set aside, though they knew that bankruptcy was pending. They likely recognized that if they had insisted on a segregation order, the other creditors may not have agreed to the sale. It is now too late for the Superintendent and the QPC to ask for relief

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that they never sought during the entire CCAA process.

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

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

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

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

79 The Superintendent and the QPC contend that the CCAA does not expressly authorize a judge to transfer the location of the head office of a debtor company. And, although a judge in CCAA proceedings has inherent jurisdiction to control the court's processes, the judge does not have a similar jurisdiction to do what the motions judge did here: control the debtor Companies' or the creditors' processes. See *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 38.

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

s. 191(1) In this section, "reorganization" means a court order made under;

(a) section 241;

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

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

s. 191(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might be lawfully be made by an amendment under section 173.

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81 The applicable section here is section 191(1)(c). The stay order is an order under an Act of Parliament, the CCAA, that affects the rights among the Companies, its shareholders and its creditors. See *Beatrice Foods Inc., Re* (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]). Therefore, as both Ivaco and Ifastgroupe were subject to an order under s. 191(1)(c) of the CBCA, under s. 191(2) each of its articles may be amended to effect any change that might be made by an amendment under s. 173. Section 173(1)(b) of the statute permits a corporation to change the location of its head office:

> s. 173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> . . . . .
>
> (b) change the province in which its registered office is situated;

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

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

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

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

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

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

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law for satisfying the obligation to fund the plan.

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

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

D. Conclusion

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

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

***M. Rosenberg J.A.*:**

I agree.

***J. Simmons J.A.*:**

I agree.

Appeal dismissed.

FN1. Taking into account a $12 million distribution to the National Bank permitted by the motions judge in December 2004.

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TAB 3

ESSENTIALS OF
CANADIAN LAW

PENSION LAW

ARI N. KAPLAN

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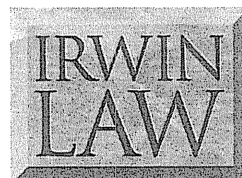

6) Statutory Deemed Trust

a) Introduction

The *PBA* establishes a statutory deemed trust with respect to contributions owing, but not yet remitted, to the pension fund.[67] The purpose of the deemed trust is to exempt contributions owing to a pension plan, and which are held by an employer, from being seized or attached by the other creditors of the employer. Importantly, the deemed trust applies only to contributions not yet remitted to the pension fund—it does not make the pension fund itself, *per se*, impressed with a trust.[68] Nor does the deemed trust apply with respect to other assets of the employer that are not associated with pension contributions.

b) Application

Generally, the deemed trust operates in an ongoing plan and on wind up and applies both with respect to money held by an employer for employee contributions prior to deposit in the pension fund and in respect of the employer's share of its contributions that are due, but not yet paid. Amounts equal to the required contributions are deemed to be held in trust by the employer until paid into the pension fund. The trust extends over these assets, whether the contributions are commingled in the general revenue accounts of the employer or kept in a separate account.[69] The statutory deemed trust also extends to the interest accruing on employer and employee contributions that are owing, but not yet remitted, to the pension fund.[70]

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67 *Ibid.*, ss. 57(1)–(4). See also Alberta (*AEPPA*, s. 40.1).

68 *Crownx Inc. v. Edwards* (1991), 7 O.R. (3d) 27 (Gen. Div.), aff'd (1994), 120 D.L.R. (4th) 270 (Ont. C.A.). It should be observed that in an earlier Ontario court decision, the court stated that "it is common ground that pursuant to s.23(3) of the Act [the deemed trust provision in the pre-1987 *PBA*] the Plan is a trust:" see *Re King Seagrave Ltd. and Canada Permanent Trust Co. et al.* (1985), 51 O.R. (2d) 667 (H.C.J.), aff'd in the result [1986] O.J. No. 2124 (C.A.). However, in that case, unlike in *Crownx*, not much turned on this finding given the court's principal conclusion in *King Seagrave* that the plan in that case was subject to a true trust based on the application of common law principles. In any event, the pension fund may not be seized nor attached by creditors of the employer as it does not form part of the assets of the employer: see Chapter 5, section C(7).

69 *PBA*, s. 57(6).

70 *Ibid.*, ss. 58(1) & (2) and *Usarco*, above note 40. See, however, *Ivaco Inc. (Re)* (2005), 47 C.C.P.B. 62 at para. 13 (Ont. S.C.J.), where the court distinguished its earlier decision on *Usarco* on the facts and declined to give effect to the deemed trust on the basis that in the earlier decision, "while there was a bankruptcy petition outstanding at the time of the motion, no one was pressing it forward,"

The *PBA* does not expressly state whether a funding deficiency on the wind up of a pension plan is secured by the deemed trust, but it appears that the deemed trust is intended to apply to the deficiency to the extent it relates to employer contributions and remittances due and owing to the pension fund on wind up, but which have not been paid.[71]

c) Limitations

There are a number of important limitations on the application of the statutory deemed trust. First, the deemed trust only extends to "accrued" contributions. This includes the regular, "normal cost," contributions together with any "special payment" (that is, contributions required to fund a plan deficit) which were required to have been made by the employer, but were not. The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which "crystallize" only upon the wind up of the pension plan. In these circumstances, a creditor will have a "secured position which will prevail against these additional obligations ... which have not yet required to be paid into the fund."[72]

Secondly, the statutory deemed trust does not exempt pension contributions in the hands of an employer from being made available for distribution among an employer's creditors in bankruptcy and insolvency proceedings.[73] Although section 67(1)(a) of the *Bankruptcy and Insolvency Act* (*BIA*)[74] exempts property held by the bankrupt "in trust" for another person from being divisible among creditors, a provincially-created statutory deemed trust (such as the *PBA*) is not operative for the

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whereas "in the present case ... 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)." The Ontario Court of Appeal has granted leave to the Superintendent to appeal the decision in *Ivaco Inc. (Re)*. See also *General Chemical Canada Ltd. (Re)*, [2005] O.J. No. 5436 (S.C.J.), following *Ivaco Inc. (Re)*.

71 *PBA*, s. 75(1)(a) and *Usarco*, *ibid*.

72 *Usarco*, *ibid*.

73 *Ivaco Inc. (Re)*, above note 70. The court also noted another limitation in that "there is no provision in [the *PBA*] that the monies be paid out to the pension plan at any particular time" (para. 17). As such, even though the deemed trust operates prior to bankruptcy, if it is not acted upon until after bankruptcy, "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." See also *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24.

74 R.S.C. 1985, c. B-3, as amended.

purposes of the *BIA*, unless the trust, in addition, "has all the requisite elements of a common law trust."[75] As explained:

> While in a non-bankruptcy situation, the [employer's] 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.[76]

If, therefore, an administrator or employees can establish that a true trust extends over the assets of an insolvent employer, those assets will be exempt from attachment by creditors and a proof of claim on behalf of employees may be allowed. Generally speaking, "[f]or these three certainties to be met, the trust funds must be segregated from the [employer's] general funds."[77] It is important to observe that for certainty of subject matter to be met, the trust funds must be "identifiable" and "traceable.". Where, prior to a bankruptcy, an employer has failed to remit to the pension fund employee pension contributions that it deducted from payroll and, instead, has commingled the contributions with its general revenues and used them for business operating expenses, the contributions become converted funds that are no longer identifiable and traceable. In such circumstances, the pension contributions lose their character as trust property held by a bankrupt and a claim by employees to recover their funds will be disallowed by the trustee in bankruptcy.[78]

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75 *Edmonton Pipe Industry*, above note 60 at para. 41. Because bankruptcy is a matter under federal jurisdiction, provincial statutory deemed trusts (such as those in the *PBA*) that do not conform to "general trust principles" cannot operate "to reorder the priorities in a bankruptcy." Therefore, although deemed trusts are effective in accordance with the provincial legislation when a person or business is solvent and operating, upon bankruptcy "the funds that are subject to a deemed trust, but are not held in accordance with general trust principles, will not be excluded from the property of the bankrupt under s. 67(1)(a) of the *BIA* and will be distributed in the priority prescribed by the *BIA*:" see *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 54 at para. 15 (C.A.). See also *British Columbia v. Henfrey Samson Belair Ltd.*, above note 73; *Usarco*, above note 40.

76 *Ivaco Inc. (Re)*, above note 70 at para. 11.

77 *Ibid.*

78 *Re Graphicshoppe Ltd.*, [2005] O.J. No. 5184 (C.A.), rev'g (2004), 74 O.R. (3d) 121 (S.C.J.). Supporing the court's reasoning was the fact that prior to the date

Thirdly, a bank's security under section 178 of the *Bank Act*,[79] both prior to and after an employer's bankruptcy, has priority over any assets impressed by the *PBA*'s statutory deemed trust. Pension benefits do not fit into the definition of "wages, salaries, commissions or compensation" owed to employees, as defined in section 107 of the *BIA*[80] and, therefore, an employee's pension claim retains the character it held prior to bankruptcy, that is., an unsecured claim.[81]

Recently, Parliament has enacted the *Wage Earner Protection Program Act*[82] (Bill C-55). This legislation amends the *BIA* and the *Companies' Creditors Arrangement Act*[83] (*CCAA*) to provide that pension contributions owing, but not yet remitted to the pension fund at the time of a bankruptcy or receivership, will have priority status, ranking above secured creditors.[84]

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of the employer's bankruptcy, the employer's account had a negative balance and therefore, none of the employee contributions remained intact. In a strong dissent, Juriansz J.A. held that the employees' trust claim should be allowed, as there was "no doubt that the pension contributions were the employees' money, and it is conceded that [the employer] held that money in trust upon deducting it from the employees' pay." In the minority's view, the pension contributions were an "indivisible asset" that could be traced to the employer's general account, based on the principle that "the mere commingling of trust funds with the trustee's own funds does not destroy a trust and, as such, does not in itself eliminate a beneficiary's right to claim a proprietary remedy" (paras. 65, 66 and 105). See also generally, *Edmonton Pipe Industry*, above note 60 and *GMAC Commercial Credit Corp. Canada v. TCT Logistics Inc.*, above note 75.

79 R.S.C. 1985, c. B-1, as amended.

80 Above note 74.

81 *Abraham v. Coopers & Lybrand Ltd.* (1998), 158 D.L.R. (4th) 65 (Ont. C.A.). This interpretation has not gone uncriticized. See the strong dissent in *Abraham* by Laskin J.A., who focused on the public policy reasons to prefer employee pension contribution claims over bank claims (at 90–91):

> It seems to me to be unjust on policy grounds, and contrary to "the realities of the arrangement" for the bank to permit its borrower to carry on business and thus enhance the value of its security and then deny compensation to those responsible for its enhancement. Workers improve the value of inventory by their labour and services. The court in *Armstrong*, understandably, sought to avoid a result that permitted the bank to claim the improved property without compensating those workers.

82 S.C. 2005, c. 47 (Royal Assent 25 November 2005).

83 R.S.C. 1985, c. C-36.

84 The relevant amendments come into force on a date to be proclaimed by order of the Governor in Council: *Ibid.* s. 141. These amendments are not yet in force.

TAB 4

Pension Management in Insolvency and Restructuring

What is at Stake?

September 20, 2005

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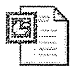 Pension Management in Insolvency and Restructuring

Introduction

Pension deficits and their treatment in restructuring cases have become a dominant issue for many debtor companies. In certain circumstances, the ability of companies to successfully restructure will depend on how they deal with pension funding obligations. The purpose of this paper [1] is to identify and briefly review significant pension matters that should be resolved in the context of corporate reorganisations and in particular corporate restructurings in an insolvency context.

Part I of this paper provides a general overview of the relevant pension considerations in a corporate reorganisation. Next, Part II discusses the specific pension issues that arise in a merger and acquisition context. Finally, Part III takes a closer look at how pension concerns have been addressed under a restructuring in insolvency. This examination ultimately points to the emergence of pension considerations as important to a number of stakeholders and a key to a successful restructuring.

Part I – Pension Overview

1. Scope

The focus of this paper is on a corporation conducting business in Ontario and subject to the laws applicable therein including the *Pension Benefits Act* (Ontario) (the "OPBA"), the regulation thereunder (the "OPBR")and the *Income Tax Act* (Canada) (the "ITA"). Although the paper will raise issues which are relevant for non-Ontario businesses, this paper is not intended to address the subtle differences in federal or other provincial legislation applicable to pension and benefit matters nor to the differences in common law approaches in other jurisdictions.

For the purposes of this paper, a corporate reorganisation will include an amalgamation, a share sale or purchase, an asset sale or purchase, an event of significant downsizing and insolvency.

The paper will be limited to discussion of employer sponsored registered pension plans and non-registered or supplementary pension plans (including retirement compensation arrangements ("RCAs")). Welfare benefit plans, stock or phantom stock-based programs along with cash compensation, including severance, will not be addressed in this paper.

2. Background

(a) Types of Benefits Plans Provided by Employers

Benefits programs that may be provided by employers can be characterized as falling under one of two possible headings – defined benefit ("DB") or defined contribution ("DC"). A DB program is one in which the ultimate benefit is known or at least determinable by means of the terms of the program and other factors but the cost of delivering the final benefit is unknown. A classic example of a DB program is a "flat benefit" registered pension plan ("RPP"), common in unionised environments, in which a pre-determined annual or monthly amount of pension is payable from the plan for each year of service. Accordingly, the terms of such a registered pension plan will provide that the basic retirement benefit is, for example, $40.00 per month for life starting at age 65 for each year of recognised service and a participant in such a plan who has been a member of the plan for 30 years will receive a monthly pension of $1,200.00 for life.

In this kind of plan, the amount of a participant's pension is determinable once one knows both (a) the level of monthly benefit promised and (b) the number of years of recognised service the participant has accumulated – thus the benefit is "defined". However, the cost of providing the benefit is unknown since it depends on a variety of factors (e.g. the benefit level that will be in effect at retirement; the precise date the pension will commence; the length of time the pensioner will live and the length of time his or her spouse will live if there is a survivor component; the rate of return on plan assets in the period prior to retirement; the rate of return on plan assets provided after retirement, where the employer does not purchase annuities at the employee's retirement from an insurer to pay the pensions; and the prevailing interest rate available at the time the annuity is purchased). Rather, the cost is simply predicted in advance using actuarial advice which recommends, from time to time, contributions based on estimates of the foregoing factors.

In contrast, a DC program is one in which the amount of employer and, if applicable, employee contributions is known and the benefits are simply those which can be purchased with the accumulated contributions. An example of this would be a DC registered pension plan where both the employer and the employee contribute 5% of salary (both subject to limits under the applicable tax legislation), the contributions are then invested but it is uncertain as to the amount of lifetime pension that the contributions may ultimately yield based on investment return in the pre-retirement period and the cost of acquiring an annuity at the time of retirement.

In the context of corporate reorganisations, shareholders and management of corporations are typically interested in employee benefit plans for two main purposes. The first is to ensure that proper administrative steps are taken in respect of the planned reorganisation to ensure that there is no unintended disconnect with the programs which will create employee relations problems or exposure to claims arising from same by employees. The second is to identify existing liabilities with respect to current employee benefits and, in particular, any unfunded or under-funded liabilities connected to the programs. Therefore, DB programs are typically those which are the subject of greater attention, review and concern in corporate reorganisations than are DC programs. However,

as may be appreciated from the Enron situation, DC programs are not immune from problems. For example, there are issues emerging from promotion of the employer's shares as an investment alternative in such programs and the unsurprising fall out when both the employer fails and the employee's corporately sponsored savings program account has been reduced to a fraction of its earlier value.

(b) Retirement Programs – RPPs and RCAs

As noted above, probably the most recognisable form of DB arrangement in retirement savings is the DB RPP which may take the form of a flat benefit plan as described above or a program which bases the benefit on annual or average annual remuneration. In all cases, the hallmark of such a program is that the quantum of the benefit is determined or calculable by reference to a formula and is not based upon the contributions to the programs. Some programs require employee contributions but, ultimately, in offering the program the employer has made a promise to the employee to deliver a particular amount of pension and if the assets that have been allocated from time to time to the pension plan to meet the promise are insufficient to provide that amount, it will be the employer's obligation to provide additional assets to meet the promise.

Pension standards legislation requires that the employer or plan administrator cause regular actuarial valuations of the funded position of a DB RPP program to be completed and that contributions be made in accordance with pension standards laws so that the benefits are likely to be satisfied from the pension fund. However, there is a somewhat common misconception that employers are required to ensure that the RPP is, at all times, fully funded. That is simply not the case and pension standards legislation only serves to require that current service contributions be made on a reasonable basis and that any other unfunded liabilities or solvency deficiencies be eliminated by adopting a compliant amortisation program (these technical pension issues are discussed further in Part III of the paper). If investment performance is regularly below the actuarial estimates, then the fund will fail to grow to the level necessary to meet the promised benefits. Contributions that are required by pension standards legislation will generally be tax deductible.

Key features of a properly administered DB RPP are:

- the plan provides a formula to determine the benefits
- the employer must contribute to a pension fund and the employees may be required to contribute
- contributions are held in a tax-deferred trust – tax being payable only on amounts paid from the trust to the plan participants (or the employer)
- employee and employer contributions are deductible from the contributor's income and employees receive no income inclusion for employer contributions
- the plan must be registered under both tax laws and pension standards law.

Because of the relatively modest limits on so-called "tax assisted retirement savings" in Canada, [2] many employers now provide a supplementary pension (often referred to as a "Supplemental Executive/Employee Retirement Plan" or SERP) which provides benefits that would otherwise have

been provided under the terms of the employer's registered pension plan were it not for the tax limits on benefits payable from such a registered plan. For 2005, a pension payable from a registered pension plan cannot exceed $2,000 for each year of credited service thereunder [3]. For a 30 year employee, current limits allow for an annual pension of approximately $60,000. In the event that the employer's pension program is designed to replace, for example, 60% of an individual's pre-retirement earnings and the individual earns $200,000 per year, the registered pension plan would only be able to provide one half of the anticipated $120,000 annual pension. An equal amount would, therefore, be provided out of the SERP. If the SERP is funded, it will most likely take the form of an RCA and will be subject to the rules dealing with RCAs.

An RCA [4] is essentially a funded (or secured) pension plan that does not otherwise qualify as a specified type of "plan" defined under the ITA. RCA is defined in the ITA as follows:

"retirement compensation arrangement" means a plan or arrangement under which contributions (other than payments made to acquire an interest in a life insurance policy) are made by an employer or former employer of a taxpayer, or by a person with whom the employer or former employer does not deal at arm's length, to another person or partnership (in this definition and in Part XI.3 referred to as the "custodian") in connection with benefits that are to be or may be received or enjoyed by any person on, after or in contemplation of any substantial change in the services rendered by the taxpayer, the retirement of the taxpayer or the loss of an office or employment of the taxpayer, but does not include

(a) a registered pension plan,

(b) a disability or income maintenance insurance plan under a policy with an insurance corporation,

(c) a deferred profit sharing plan,

(d) an employees profit sharing plan,

(e) a registered retirement savings plan,

(f) an employee trust,

(g) a group sickness or accident insurance plan,

(h) a supplementary unemployment benefit plan,

(i) a vacation pay trust described in paragraph 149(1)(y),

(j) a plan or arrangement established for the purpose of deferring the salary or wages of a professional athlete for [the athlete's] services as such with a team that participates in a league having regularly scheduled games (in this definition referred to as an "athlete's plan"), where

(i) the plan or arrangement would, but for paragraph (j) of the definition "salary deferral arrangement" in this subsection, be a salary deferral arrangement, and

(ii) in the case of a Canadian team, the custodian of the plan or arrangement carries on business through a fixed place of business in Canada and is licensed or otherwise authorized under the laws of Canada or a province to carry on in Canada the business of offering to the public its services as trustee,

(k) a salary deferral arrangement, whether or not deferred amounts thereunder are required to be included as benefits under paragraph 6(1)(a) in computing a taxpayer's income,

(l) a plan or arrangement (other than an athlete's plan) that is maintained primarily for the benefit of non-residents in respect of services rendered outside Canada,

(m) an insurance policy, or

(n) a prescribed plan or arrangement,

and, for the purposes of this definition, where a particular person holds property in trust under an arrangement that, if the property were held by another person, would be a retirement compensation arrangement, the arrangement shall be deemed to be a retirement compensation arrangement of which the particular person is the custodian. [emphasis added]

Unless one attempts to re-characterise the nature of the payments under most kinds of funded or secured SERPs, the contributions made thereto will be made "in connection with benefits that are to be or may be received or enjoyed by any person on, after or in contemplation of ... the retirement of the taxpayer". While it is possible to parse through the definition and construct what is, in effect, a supplementary pension benefit that somehow skirts the definition of RCA (e.g. by making the payments payable earlier than termination of employment or earlier than retirement), for most employers who have investigated the various funding vehicles, the RCA, like it or not, is the form of vehicle which is adopted to provide the funding or security of the SERP promise. Technically speaking, the definition operates such that if the corporation can fit the arrangement under the auspices of any of the other enumerated types of plans (e.g. RPP, employee profit sharing plan, employee trust), the arrangement will not be an RCA.

The general operation of an RCA is that employer contributions are immediately deductible to the employer (subject to the usual reasonableness test) but the employer must withhold 50% of the amount of its contribution and remit that as a refundable tax. [5] The refundable tax is held by the Canada Revenue Agency ("CRA") in a non-interest bearing account and the amount is refunded to the custodian as described below. The net amount contributed is paid to the "custodian" of the arrangement. The custodian is typically a trustee and therefore trust terminology will be used in this paper. The trust is also subject to a 50% refundable tax on its annual income and realised gains. However, the custodian's obligation to remit this refundable tax is reduced to reflect distributions made by the custodian on the basis of $1 for each $2 that has been distributed. Amounts distributed from the trust, whether to the RCA members or to the employer, are subject to tax in the hands of the recipient.

Although the RCA was meant to operate as an anti-avoidance measure and was initially viewed as a vehicle to avoid at all costs, it has become increasingly used by employers who find themselves obliged to provide funded benefits in order to keep senior employees content. Accordingly, it is now viewed as a necessary evil.

As it is not a "registered" plan, there are no investment restrictions on an RCA. Indeed, somewhat inventive strategies with respect to investments and otherwise have been developed for RCAs - principally the use of exempt life insurance policies or leveraging the RCA. However, it can be argued that it would be of some utility in an RCA to hold investments that will not produce annual income or dividends but will provide only capital growth such as insurance policies or growth stocks. In that way, the tax burden of refundable tax may be less onerous than would otherwise be the case.

Described in a simplified fashion, the employer contributions made to an RCA will all be subject to

a 50% refundable tax but, subject to the usual reasonability test, will be deductible from the income of the employer in the year in which the contribution is made. Thus, in the event that a gross contribution of $100.00 is made to an RCA, $50.00 will ultimately reside in the refundable tax account established for the RCA and $50.00 will be held by the trustee. The trustee will be obliged to file a tax return for the RCA 90 days after year end in respect of the calendar year. The net income and realised gains of the trust are also subject to a 50% refundable tax. It is a result of both the refundable tax on employer contributions to RCAs and the ongoing 50% refundable tax on the net amount and gains of the trusts that the RCA compares unfavourably, in most observer's minds, to the RPP or other tax-deferred trust vehicle which it tops up. Some techniques to minimise the debilitating effect of the high tax rate are to hold securities which yield little in the way of dividends or income but that provide capital growth so that, if held for a reasonably long period time, the effects of the refundable tax are minimised. However, the negative tax effects of the RCA in respect of capital gains have become much more pronounced in the last 12 months with the substantial reduction in the capital gains inclusion rate together with our gradually falling federal and provincial personal income tax rates.

Recovery of the refundable tax is, generally speaking, made in one of three ways. While the trust is ongoing, the trustee will receive credit either in the form of a reduction in annual refundable tax to be remitted to the Receiver General or by way of refund from the refundable tax account relating to distributions made to beneficiaries of the trust at the rate of 50 cents for every one dollar of distribution.

The second way in which refundable tax may be refunded is by making the election permitted under subsection 207.5(2) of the ITA. Provided the assets of the trust consist only of "cash, debt obligations, shares listed on a prescribed stock exchange, or any combination thereof", this election permits the trustee to elect, in the tax return, that the refundable tax be deemed to equal the "value" of such assets. Thus, any amounts in excess of that amount which are held by the Receiver General in the refundable tax account will be refunded to the trustee.

The final method to recover the refundable tax is a variation of the foregoing but simply occurs when the other assets of the trust have been totally disbursed therefrom and thus, there remain zero assets in the trust fund. At this point, a request can be made to recover the entirety of the refundable tax. The current administrative practice of CRA in respect of RCAs appears to permit recovery of this refundable tax by filing a tax return at any time. That is, there is no need to wait until the year end to file this tax return, and the officials at the Winnipeg office will process the return prior to waiting for the year end.

(c) Special Issues in DB Arrangements

There are certain features of benefits plans which may or may not exist from program to program which can be expected to result in greater complexity and risk of large unfunded liabilities, depending upon the precise form of the reorganisation at issue. The most important types of these features are outlined below.

(i) Special Concerns for Retiree Pension and Non-Pension Liabilities

DB retirement programs may include both benefits from RPPs ("registered benefits") pension plans and benefits from SERPs ("non-registered benefits"). While registered benefits are always funded to some extent, partly due to the favourable tax regime and as a result of requirements of pension

standards legislation, this is not true of non-registered benefits. Accordingly, while there is always some risk that an RPP may not be fully funded (e.g. as a result of adverse experience as against actuarial assumptions, recent benefit improvements, prevailing economic circumstances etc.) it is more likely than not that non-registered benefits will not be funded at all. [6] In the context of a corporate reorganisation, these unfunded liabilities merit specific attention as it will be appropriate for the purchaser to factor in such liabilities in determining the price it pays for the shares or the assets to be acquired.

In addition, there may be issues relating to tax deductibility of amounts paid to persons who were never employed by the purchaser. These concerns must be addressed where material unfunded liabilities for retirees are being assumed in an asset purchase transaction. Similarly, it may be useful to review the past dealings of an entity which is subject of a share purchase transaction or to determine whether any such liabilities exist as a result of prior transactions undertaken by the target corporation.

(ii) Change of Control Provisions

In the volatile commercial world in which we now live, it is becoming increasingly more common to institute change of control provisions as independent benefits – primarily those which would yield "parachute payments". Like severance programs, these are not included as a benefit plan for purposes of this paper. However, change of control provisions may also be added as features of regular benefits programs and when triggered yield (i) earlier vesting, (ii) requirements to prefund what are otherwise unfunded benefits or (iii) a requirement to provide a greater level of benefit than existed prior to the change of control. These features are "triggered" when any one of the events which gives rise to a change of control, as defined by the term adopted for the particular plan, occurs. Typically, this list includes acquisition of control [7] by a new shareholder but may also include other tests including a sale of a large portion of a corporation's assets.

Any corporation undertaking a share purchase (and even some asset purchases depending on the trigger events) must pay careful attention to the target corporation's benefits programs to determine whether change of control features exist and, if they do, what the precise effect will be so that the proper value can be placed on the shares or the assets. These kinds of stand alone programs or added features to existing benefits programs are often implemented either on the eve of a takeover or at a point in time when the corporation feels that it is vulnerable to be taken over. Accordingly, change of control features may be introduced to serve as so-called "poison pill" provisions. It is beyond the scope of this paper to investigate the possible merits or challenges to such provisions, but it is worthwhile noting that, in reviewing these provisions, a purchaser may wish to verify the validity of the program or feature.

Finally, it should be noted that corporate re-organisations where a change of control provision in a SERP is unintentionally triggered by an "internal" re-organisation are not uncommon. In these circumstances it may be necessary to obtain waivers or consents from the SERP members to avoid having to fund the arrangement or call a letter of credit. Often, due to the internal nature of the event, the operation of the provision in the context is discovered late in the process and may cause embarrassment and even serious problems. Accordingly, early awareness of these provisions and, better yet, thoughtful design of the change of control feature when it is adopted is desirable.

(iii) General Surplus Considerations in Pension Plans Where No Downsizing

When dealing with registered pension plans, one should appreciate that pension plans may hold

assets which exceed the liabilities at the date of the reorganisation. Various events giving rise to a corporate reorganisation may bring the fact of such a surplus into focus. For instance, in completing a share purchase transaction, there may be issues of how to value the surplus that exists in the registered pension plan(s) and whether some kind of price adjustment for the level of surplus existing on closing should be provided. Any purchaser who is, in fact, "paying" for surplus should investigate whether the surplus has a value to it in so far as the surplus may or may not be available to take so-called employer "contribution holidays" or given the terms of the plan or statutory and common law regimes existing in Canada from time to time to be withdrawn for the benefit of the target corporation.

These issues are also highlighted in asset purchase transactions where there may be a more obvious issue of a price increase to reflect surpluses being transferred from the vendor's pension plan to the purchaser's pension plan.

Finally, in the event that the corporate reorganisation is of an insolvency nature, this may give rise to a termination of an RPP. The rules in pension standards legislation governing distribution of all of the assets of the RPP may then require that the surplus be distributed entirely to the plan members or be shared between the plan members and the employer (or trustee in bankruptcy as the case may be) after completion of a consensual surplus sharing agreement and approval of the applicable regulatory authorities.

(iv) Surplus and Other Considerations in Downsizings

The issue of the distribution of pension surplus on partial wind ups of RPPs has received rare media and other attention over the last few years, culminating in the Ontario Court of Appeal landmark decision in *Monsanto* [8], which was recently upheld by the Supreme Court of Canada . In this section of this paper we will review and consider the implications of the *Monsanto* decision.

In Ontario, a partial wind up ("PWU") of an RPP is an event that will occur in one of two ways. The first is when the sponsor of an RPP voluntarily declares such an event to occur – and the plan sponsor has no direct, legislative direction or impediments to making such a declaration. The second way in which a partial plan wind up might occur is for the Superintendent of Financial Services (the "Superintendent") to declare the same. The Superintendent can make such a declaration only in prescribed circumstances, and the OPBA provides that the Superintendent retains discretion not to make such a declaration even where the prescribed circumstances are found to exist. Such circumstances [9] generally occur when there is a "significant" decrease in the population of the active members of the RPP arising from involuntary terminations. Most typically this will occur in conjunction with downsizings undertaken by the employer, but may also occur in the event that a business is shut down at a discrete location, there is a plant closure. The rules in the OPBA are not crystal clear and have been the subject of some litigation, none of which has provided a broad set of principles as to what may constitute "significant" or what may or may not cause the Superintendent to exercise discretion to not order a PWU when the prescribed conditions are found to exist. It is beyond the scope of this paper to delve further into the issues surrounding the basis for a PWU order but it is sufficient to note that a larger downsizing (including plant closure) falls within the purview of "re-organisation" for the purposes of this paper and so it is possible that a re-organisation of that nature may trigger a PWU.

Background - *Monsanto*

The background to the Supreme Court decision in *Monsanto* is necessary before proceeding. In

December of 1998 following a voluntary PWU of its RPP, the Superintendent proposed to refuse to approve the PWU report in respect of employees who had terminated employment with Monsanto Canada Inc. ("MCI") between December 31, 1996 and December 31, 1998. The *Monsanto* case is relevant for a number of significant pension standards and administrative law issues but for the purposes of this paper, the analysis is restricted to the issue of whether or not subsection 70(6) of the OPBA requires that surpluses be distributed on PWU. That provision reads as follows:

70(6) On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

It should be noted that subsection 70(6) is unchanged since the OPBA took effect on January 1, 1988 and that prior versions of the legislation, dating back to 1969, contained largely analogous provisions. Nonetheless, neither the Superintendent nor her predecessors had ever issued an order which had the effect of requiring that surplus be distributed from an RPP on a PWU. Instead, when the Superintendent issued approval letters for wind up reports, and only in the period of a few years prior to *Monsanto* , a comment was added to the effect that the plan administrator was responsible for discharging the obligations under the OPBA with respect to the surplus attributable to the PWU. That is, no order requiring the surplus actually be distributed ever had followed such reports. However in December of 1998 such an order was issued to MCI.

MCI appealed the Superintendent's order to the Financial Services Tribunal (the "Tribunal") and, in a split decision, two of three panellists (the "Majority") favoured MCI's position and found that subsection 70(6) of the OPBA does not require that surplus be distributed on a PWU. One of the three panellists (the "Minority") concluded otherwise and found that the effect of the provision was to require that surplus be distributed. One of the significant areas of difference between the Majority and the Minority was the interpretation of the Supreme Court of Canada's (the "SCC") decision in *Schmidt v. Air Products of Canada Ltd.* [10] (" *Air Products* "). The Majority concluded that the SCC's decision stood for the proposition that no surplus exists until an RPP is fully wound up, whereas the Minority determined that a PWU is a concept that creates a complete termination of the portion of the RPP relating to the affected employees and thus crystallizes surplus in the manner mentioned in the *Air Products* decision. The conclusions on this issue are a key area of departure in determining what the *Monsanto* decision will ultimately mean.

The Superintendent and a group representing terminated MCI employees appealed the Tribunal's decision to the Divisional Court and, in a brief decision dated March 19, 2001, the Divisional Court adopted the reasons of the Minority, but also noted that

... the result intended by the Legislature ought to be set out in language that is clearer than that presently contained in section 70(6) at the earliest reasonable opportunity. Until then, however, this judgment will serve to provide guidance as to what this Court considers the Legislative intention to have been.

The Divisional Court, characterising the issue as "critical", observed that the issue of distribution of surplus on a PWU was one that was not clearly dealt with in the OPBA and that language to more clearly reflect legislative intent should be added to the OPBA.

Court of Appeal Decision in *Monsanto*

On November 22, 2002, the Ontario Court of Appeal (the "OCA") released its decision in *Monsanto* . In a judgment containing more detailed reasoning than was found in the decision issued by the lower court, the decision of the Divisional Court was upheld. The OCA observed that on a full wind up of an RPP, the members have the right to require that the full surplus be distributed [11] – although it should be noted that this does not prejudge to whom the surplus is to be distributed. The OCA asserted that the scheme of the OPBA is to deal with full wind ups and PWUs in a parallel manner and concluded that the legislation had, since a 1969 regulation, provided for similar rights on PWU as existed on full wind up. Because the distribution of surplus is a right on full wind up, the reasoning followed that it must be a right on PWU. The OCA also expressed the view that it was less complicated to deal immediately with the distribution of surplus in respect of the group affected by the PWU than would be the case later (i.e. if the matter was deferred to a full wind up).In addition, the OCA found that the decision of the SCC in *Air Products* was simply inapplicable to PWU cases as that case involved a full wind up and because it did not involve any statutory provisions, let alone a provision such as subsection 70(6) of the OPBA. Accordingly, the OCA found that the reasoning of the Majority of the Tribunal, when it relied on *Air Products* for support that there was no surplus to distribute on a PWU, was flawed.

It should be noted that one issue that was agreed on by the Majority and the Minority of the Tribunal was that annuities need not be purchased on the PWU of a plan to satisfy the obligations to those affected persons who chose a pension from the RPP. This element of that decision was not appealed by the Superintendent nor the former members. However, it would appear that the OCA's comments on the strong (if not exact) parallel of treatment of full and PWUs in the OPBA suggests that annuity purchases should be a requirement along with surplus distribution since distribution of all of the assets means simply that all assets leave the RPP.

The Supreme Court of Canada Speaks [12]

Regrettably for employers, the *Monsanto* decision, issued in late July 2004, upheld the decision by the OCA and determined that subsection 70(6) of the OPBA requires that if there is a surplus in the plan at the time of a PWU, then the portion of the surplus allocable to the plan members affected by the PWU ("Affected Members") must be distributed from the plan.

In reaching this conclusion, the SCC rejected policy arguments that its ruling could result in some plan members receiving less than full benefits from the plan while the Affected Members receive full benefits plus a distribution of surplus. It was argued that if the surplus that existed at the time of a PWU has subsequently eroded and a deficit now exits, members and pensioners left in the plan could find themselves receiving less that the promised pension should the employer become insolvent and unable to fund the pension plan. The SCC expressed sympathy for the Affected Members given that they have suffered a job loss. The SCC also seemed to adopt the view that a appropriate surplus distribution to the Affected Members is not prejudicial because there still exists a notional surplus for the remaining members and those remaining members are also protected by the funding requirements under pension standards law to deal with future deficits. Finally, the distribution of surplus was also found by the SCC to be consistent with the trust principles outlined in *Schmidt* . Following the SCC's rationale, when a partial plan wind up occurs, the portion of the actuarial surplus attributed to the Affected Members becomes an actual surplus to which they are entitled.

Implications of *Monsanto*

The obvious result of the *Monsanto* decision is that on future PWUs surplus will need to be

distributed under some kind of regime which may or may not involve "sharing" and which will, no doubt, evolve over time. However, the retroactive issues raised by *Monsanto* are very uncertain and very complex.

It is submitted that in order to properly implement the findings of the SCC, one must go back to the 1969 regulation referenced in the *Monsanto* decision and, starting from the effective date of that change, examine each and every PWU report for each RPP to determine if that PWU was in respect of any Ontario members and if surplus existed at the time of that PWU. If it did, then steps to properly distribute that surplus must be taken (see below for possible methodologies to determine the surplus). The same process must be followed through in each successive PWU report for such RPP. Of course, the distribution of such surpluses will mean that all of the subsequent valuations (including regular triennial reports, wind up reports, conversion reports, sale of business transfers, mergers reports, etc.) prepared in respect of the RPP – for both pension plan funding and for accounting purposes – will have been inaccurate and so these too will need to be adjusted and restated. This recreation of history, would be, without doubt, a massive undertaking that would require years, if not a decade, to resolve and will be very expensive.

In addition, the foregoing does not even take into account those events which were not voluntarily or otherwise declared as PWUs, but which might have constituted PWUs. Plan members or former members who now understand they may be entitled to some kind of distribution of surplus may wish to initiate reviews by the Superintendent of such potential events with a view to seeking a PWU order. The requirement to distribute surplus will bring with it greater likelihood of disputes as to the number and precise date of PWU events since these may influence the size of surplus and the groups effected. Furthermore, the issue of a requirement to purchase annuities will also need to be taken into account. This has potentially greater affects than surplus distribution since not all PWUs involve a surplus but most will involve at least some members who elect pensions. As a practical matter, there may be difficulties in obtaining deferred annuities.

The upshot of the foregoing is that there will be no certainty in the operation and administration of defined benefit RPPs until all of the historic reports have been corrected and events requiring a surplus distribution and/or annuity purchase addressed.

There are two likely methodologies for establishing the amount of a PWU surplus to be distributed. The first is to accept that there has been a PWU event affecting the entire RPP and to measure the surplus at the time of the event, in a sense to "freeze" it, and then to require that that amount be distributed. This methodology will need to address the issue of whether the frozen amount should be increased or decreased with a rate of interest or otherwise during the period from the PWU date to the date of distribution. The second methodology is to view the PWU as creating a second RPP at the date of the PWU and to identify the assets attributable to this newly-created RPP distinct from the assets of the initial RPP. Since, in most instances, the assets allocable to the PWU, including the allocable surplus, were not separated from the other plan assets, this approach would result in the assets allocable to the second plan increasing or decreasing with the investment gain or loss incurred on the total fund over time. This latter approach may be favoured by many employers faced with PWUs in the late 1990's because the surplus assets to be distributed would "float" in value with investment performance and the employer may not be the guarantor of the surplus amount. However, it is conceivable that those affected by the PWU would argue that the plan administrator should have altered the investment strategy for the PWU assets given that the assets should be distributed relatively quickly and a shorter term investment strategy was appropriate. If the first approach is adopted, the employer would, in effect and at a minimum, guarantee the value that existed at the PWU date. In this scenario, it is also possible that those affected by the PWU would be entitled to an increase in the value of the surplus assets on the theory that the plan administrator

retains an obligation to invest the assets prudently until they are distributed. In any event, the regulators are going to have to give a great deal of thought to this issue and develop a sensible, coherent, comprehensive and (hopefully) fair policy.

Within one month of the SCC decision in *Monsanto* , Ontario's pension regulator (the "Financial Services Commission of Ontario" or FSCO) sent letters to a number of employers who had filed a PWU report prior to July 29, 2004, (the date of the SCC decision in *Monsanto*). These letters request an updated balance sheet and a timetable and proposal for dealing with any distribution of surplus related to the PWU. More recently, on March 22, 2005, FSCO released a brief report on partial wind ups in the post Monsanto era. Unfortunately, this report does little to alleviate the concerns and the uncertainty surrounding the Monsanto decision discussed in this section of the paper.

Notwithstanding the foregoing complexity produced by the *Monsanto* decision, quite possibly the most negative repercussion is that it produces opportunity for significant inequities among plan members to emerge. It is quite evident in recent years that many RPPs that were in surplus in the mid to late 1990's are no longer in surplus or have had their surpluses slashed significantly. The *Monsanto* result has the potential to turn the defined benefit RPP into a form of lottery. In this lottery, members who lose their jobs in a PWU and at a time when the RPP is perceived to be very well funded have the opportunity to benefit from the surplus that existed at that time. Conversely, those members who terminate employment or retire in circumstances that are not a partial or full wind up and those employees who are included in a PWU which occurs during a period where the plan is not in surplus will not have that opportunity. In addition, and most importantly, should the RPP be fully wound up at a time where there are insufficient assets to fully provide the pensions and where the employer is insolvent, then (absent intervention of the Ontario Pension Benefits Guarantee Fund) the members involved in the full wind up would receive less than 100 percent of their basic pension benefits and, of course, no surplus. Unfortunately, these concerns were not founded to be persuasive by the SCC.

At this time, it is unclear whether and when there might be a legislative response to *Monsanto* . To the extent that there is no response, then employers undertaking corporate re-organisations which involve job losses of the nature that may trigger a PWU should take notice of the repercussions of the requirement to distribute surplus on a PWU. As the recent case law is unfavourable to employer claims to surplus in most instances, any requirement to distribute surplus on a PWU brings with it a significant likelihood that this means distributing it to the plan members. Therefore, most employers will first try to avoid having to distribute surplus and, if that cannot be avoided, then attempting to obtain value for same. Methods to avoid having to distribute surplus include, adopting a funding policy which is unlikely to give rise to surplus in the first place and if there is a surplus, trying to time the events such that the PWU date or dates occur when the surplus is at its relative lowest mark. In addition, it may be possible to negotiate with the employees to reduce severance payments in return for benefit enhancements or other surplus payments, although it remains to be seen if employees will accept this. Employer's who provide SERPs may wish to add as an offset to SERP benefits the value of any surplus distributed from the RPP.

(d) DC Arrangements

Just as there are DB RPPs, there may be DC RPPs (which, along with other savings arrangements are sometimes referred to as Capital Accumulation Plans or CAPs). As noted above, these programs feature monies contributed by the employer or the employee (within applicable tax limits) and the

contributions are invested to produce a lump sum which may be used to buy an annuity or otherwise provide retirement income. In theory, these programs are less problematic for employers in the context of corporate reorganisations because there are no unfunded liabilities so long as the contribution obligations are satisfied. While this is correct, it would be unwise to believe that there is no potential exposure in connection with such plans. Without delving into the issue in detail, it should be noted that the investment of such plans is becoming a matter of greater scrutiny, both by the affected employees and by the regulators and therefore it would be unwise to assume that no liabilities may exist with respect to the assets once they are contributed.

Indeed, the Joint Forum of Financial Market Regulators (the "Joint Forum") released on May 28, 2004, a final version of the "Guidelines for Capital Accumulation Plans". [13] The Joint Forum is comprised of CAPSA, the Canadian Council of Insurance Regulators ("CCIR") and the Canadian Securities Administrators (the "CSA") who have been working together to improve and develop industry standards in respect of CAPs that are employer sponsored and provide for investment decisions to be made by the employees who participate in them. The guidelines are a response to the perception that CAPs, although they have been gaining in popularity, have not been the focus of regulators and CAP sponsors have been slow to recognise their fiduciary obligations in this area. The guidelines were created to reflect the expectations of the regulators regarding the operating of CAPs, regardless of the regulatory regime applicable to the plan and were intended to support the continuous improvement and development of industry practices.

The guidelines outline the rights and responsibilities of CAP sponsors, service providers and CAP members with respect to setting up a CAP, investment information and decision-making tools for CAP members, introducing the CAP to CAP members, ongoing communications to CAP members, maintaining a CAP and finally, terminating a CAP. Although the result remains merely a guideline rather than legislation, a purchaser of shares would be well advised to conduct its due diligence of CAPs with a view to ensuring that the CAP sponsor has, in fact, complied with them.

Despite the real issues presented in the investment of CAPs, from a general point of view, it is fair to say that so long as the obligation to contribute has been satisfied, the single most significant obligation of an employer in respect of these arrangements is discharged and they should not be as problematic, in concept, as would be a DB arrangement.

It should be noted that the current level of tax assisted retirement savings permitted under the ITA is, as with DB RPPs, insufficient for high income earners under DC RPPs and, although they remain rare, there is an increase in the number of DC SERPs developing in Canada. As is the case with DB SERPs, it is typical that the DC SERP is not prefunded and, therefore, even in a DC environment there is the possibility that an unfunded liability under a DC SERP will exist. In these unfunded arrangement, it is common to find is a notional accounting of contributions which is maintained along with imputed investment returns. Accordingly, vigilance on the retirement front in these matters is particularly necessary.

For the balance of this paper no further specific mention of DC arrangements will be made, but unfunded DC SERPs should be considered to present issues which are virtually identical to those found in respect of unfunded DB SERPs.

(e) Special Concerns for Unionised Workforces

There may be significant issues to be dealt with in certain corporate re-organisations when operating

in a unionised environment. Accordingly, the first order of business in dealing with benefit plans in a unionised environment is to determine whether the programs are "bargained" or not. It is beyond the scope of this paper to provide an analysis of those complicated issues, but suffice it to say that it is a matter of law and significant jurisprudence as to whether or not a program will be viewed at law as being bargained. To the extent it is the subject of collective bargaining, it will typically be impossible under the terms of the collective agreement for the employer to unilaterally amend the program. This may not preclude changes in the identity of the actuary who determines the contribution amounts, but would preclude changes in the terms of the plan. Accordingly, it is important to determine whether the benefits program is circumscribed by a collective bargaining agreement or not.

A secondary issue which may arise, is the assertion by the bargaining agent that it is impossible to divide the bargaining unit between retirees and active employees. That is, in an asset purchase context the bargaining agent may grieve against the purchaser the fact that the business transaction contemplates that the pension liabilities for the retired employees formerly employed in the bargaining unit remain with the vendor while the liabilities for the active employees are transferred to the purchaser and its pension plan. The bargaining agent would be concerned that it would no longer be in a position of leverage to attempt to obtain *ad hoc* increases to retirees' pensions if the vendor retains responsibility for those retirees. In short, the threat of a strike against the purchaser will do little to motivate the vendor to provide *ad hoc* pension increases to the retirees. It is does not seem likely that the bargaining agents' view in this context would prevail. However, this should serve as a warning to those involved in mergers and acquisitions work that the bargaining agent may from time to time try and take such a position.

Part II – Mergers & Acquisitions

1. Share Purchase or Sale Transactions

The first specific form of corporate reorganisation to be considered in this paper will be the share purchase or sale. The basic context is fairly simple from a human resources' perspective in that the sale or purchase of the shares does not affect the employment relationship – with the possible sole exception should any change of control provisions exist in the target corporation's benefits programs. All that needs to be done in the context of this type of transaction is to ensure that the *status quo* is maintained and that the sources of all liabilities have been reasonably ascertained so that each party understands what liabilities exist with respect to benefits programs in the target corporation. The following will consider these issues from the perspective of the vendor first and then the purchaser.

(a) Vendor's Perspective

While in some cases vendors will prefer to act in a reactive manner to concerns a purchaser may raise as the purchaser conducts its due diligence, some vendors take a proactive approach and want to understand all of the benefits issues prior to or at least coincident with the purchaser uncovering the issues. Vendors will be asked to provide substantial representations and warranties with respect to benefits plans and the persons bound by the representations will need to have comfort that the representations can be given or, if not, how to describe the exceptions to the requests. Accordingly, it is becoming more and more common for vendors to undertake their own level of due diligence in order to determine, in advance of the purchaser, the potential problems that may exist and be

discovered by purchasers so that, in responding to the purchasers' concerns, they have a high level of awareness and have had opportunity to plan an explanation or even adopt a course of action in anticipation of these specific requests. The first level of diligence is to identify all relevant plans (including those which have no current accruals) and then to determine the liabilities and the assets backing the benefits promises so as to assess whether there are unfunded liabilities, their quantum and how they should be dealt with.

(b) Target Participates in Corporate Group Plans

One special but not uncommon set of circumstances which can require a different approach in the benefits area of a transaction arises when the target corporation is part of a larger corporate group and is not the sole employer participating in various benefits programs including pension plans. In the event that the target corporation is simply one corporation among many participating in a registered pension plan or a SERP, the transaction will be completed, from a benefits' perspective, more like an asset purchase than a share purchase. The RPPs and SERPs are likely to need to be split up amongst the "retained" and departing corporations in the group and a decision will have to be made as to whether the existing arrangements remain with the target or whether the target is required to (a) establish its own separate RPP and/or SERP and (b) assume liabilities for its employees by means of some form of asset and liability transfer. Such a circumstance will likely present an issue as to whether or not the liabilities for the former employees of the target corporation (or, in some cases, the business which it operates, in the event that the business was previously operated as a division and has been recently spun off to the target corporation) should remain with the corporate group or be transferred to the target's plan. This issue will be dealt with in the same manner as an asset purchase and reference to may be made later in this paper. In connection with a pension asset and liability transfer, the vendor may wish to cause the pension plan restructuring to occur, or at least be effective, prior to the time the sale is pursued by re-organising the pension arrangements before offering the corporation for sale. In this way, while the purchaser can complain over the methodology of the transfers there will be no need to negotiate that element which can be complex and time consuming.

(c) Search for Unfunded Liabilities

Issues of both a basic and an esoteric character may emerge in the course of a due diligence review of the target's benefits arrangements. It is important that a vendor identify supplementary pension plans as these are typically unfunded or at least underfunded and every purchaser will be focussed on them. A review of the funded status of the registered pension plans should be conducted to determine the same and may reveal whether there is opportunity to enhance the purchase price to reflect a surplus. In the context of a share sale which merits a fair amount of vendor's diligence, the vendor may wish to review its pension fund arrangements to ensure that the investments held thereby are all permitted investments. Moreover, to the extent that more exotic derivative transactions (including SWAPs) have been entered into, the vendor may wish to ensure that the counterparties are properly bound so that the purchaser will not raise concerns of potential exposure under invalid or unenforceable contracts. More routinely, the vendor should check to confirm that the foreign property limits in a registered pension plan have been observed. [14] Of course, the existence of post-employment indexation features (whether contractual provisions or as a result of a consistent past practice of *ad hoc* increases that may be deemed to give rise to a promise in either RPPs or SERPs) should be reviewed as these may be the sources of potential future liabilities. Other potential sources of future liabilities include improper allocation or distribution of surplus and

expenses improperly charged to the plans.

Finally, the existence and operation of any change of control provisions should be well understood by a vendor before the purchaser begins to question these particular features.

(d) Purchaser's Perspective

The purchaser's perspective is different from the vendor's perspective in that the vendor simply wishes to ascertain what issues may arise in the context of a share purchase transaction and to be comfortable that it is positioned to give the representations requested of it. On the other hand, the purchaser is vitally interested in uncovering all of the potential unfunded liabilities or other sources of large liability in order to properly price the transaction or, in the extreme case, whether to proceed with the transaction. To do so, the purchaser will seek detailed representations and warranties in respect of the benefits plans. A sample of these kinds of representations and warranties is set out below:

- all of the Benefit Plans are listed in Schedule • and the Vendor has delivered to the Purchaser true, complete and up-to-date copies thereof and all amendments thereto together with, as applicable, all funding agreements, all summary descriptions of the Benefit Plans provided to past or present participants therein, the most recent actuarial reports, the financial statements, if any, and evidence of any registration in respect thereof;

- no promises or commitments have been made by the Vendor or the Corporation to amend any Benefit Plan or to provide increased benefits thereunder to any employee, except as required by applicable legislation;

- all of the Benefit Plans are, and have been since their establishment, duly registered where required by legislation (including registration with the relevant tax authorities where such registration is required to qualify for tax exemption or other beneficial tax status) and are in good standing under, and in compliance with, their terms, all applicable legislation and administrative guidelines issued by the regulatory authorities;

- all employer or employee payments, contributions and premiums required to be remitted, paid to or in respect of each Benefit Plan have been paid or remitted in a timely fashion in accordance with the terms thereof and all applicable legislation, and no taxes, penalties or fees are owing or exigible under any Benefit Plan;

- except as permitted by the Benefit Plans and applicable legislation, there has been no withdrawal of surplus assets or any other amounts from any of the Benefit Plans other than proper payments of benefits to eligible beneficiaries, refunds of over-contributions to plan members and permitted payments of reasonable expenses incurred by or in respect of such Benefit Plan;

- all employer contribution holidays have been permitted by the terms of the Benefit Plans and have been in accordance with applicable legislation;

- there are no material actions, suits, claims, trials, demands, investigations, arbitrations or other proceedings pending or, to the knowledge of the Vendor threatened with respect to the Benefit Plans against the Corporation, the funding agent, the insurers or the fund of such Benefit Plans;

- neither the execution, delivery or performance of this Agreement, nor the consummation of any of the other transactions contemplated by this Agreement, will result in any bonus, golden parachute, severance or other payment or obligation to any current or former employee or director of any of the Vendor (whether or not under any Benefit Plan), or materially increase the benefits payable or provided under any Benefit Plan, or result in any acceleration of the time of payment or vesting of any such benefits;

- none of the Benefit Plans require or permit a retroactive increase in premiums or payments, and the level of insurance reserves, if any, under any insured Benefit Plan is reasonable and sufficient to provide for all incurred but unreported claims;

- except as permitted by the Benefits Plans, their applicable funding agreements and applicable funding agreements and applicable legislation, there has been no withdrawal of assets or any other amounts from any of the Benefits Plans other than proper payments to eligible beneficiaries, refunds of over-contributions to plan members and permitted payments of reasonable expenses incurred by or in respect of such Benefit Plans;

- no order has been made or notice given pursuant to any applicable legislation requiring (or proposing to require) the Corporation to take (or refrain from taking) any action in respect of any Benefit Plan, and no event has occurred and no condition or circumstances exists that has resulted or, could reasonable result, in any Benefit Plan (i) being order or required to be terminated or wound-up in whole or in part, (ii) have its registration under any applicable legislation refused or revoked, (iii) being placed under the administration of any trustee or any regulatory authority or (iv) being required to pay any material taxes or penalties under any applicable legislation;

- the Corporation has no obligation in respect of any Benefit Plans that are multi-employer pension plans or multi-employer benefit plans except contribution obligations as set out in the collective agreements provided to the Purchaser.

It should be noted that a number of these representations are difficult for a vendor to give. Therefore, the purchaser may have to undertake significant diligence to "satisfy itself" in the event that it wishes to complete the transaction without some significant representations. Alternatively, the purchaser may seek in place of such representations some form of indemnity. That being said, a purchaser may be unable to complete a transaction unless it is provided with either (a) key representations against which it may seek indemnity should the representation prove to be incorrect or (b) a sufficiently broad indemnity. In many cases, it will be impossible to undertake the very precise detailed review necessary to uncover all potential problems. If satisfactory representations cannot be obtained, at a minimum the purchaser may seek a representation that all material documents pertaining to the benefits plans have been provided to it, so that if something that may have disclosed a problem is omitted, there may be an opportunity to pursue a breach of warranty on this basis. The parties should understand that with respect to RPPs and SERPs, the time commitments are so far out in the future that issues will often not emerge for several years. Accordingly, purchasers are advised to attempt to negotiate lengthy survival periods for the benefits representations.

2. Corporate Amalgamations

When a group of corporations are in the process of trying to streamline structure by means of an amalgamation, this often means that the employee benefits plan structure is also intended to be the subject of some streamlining. There is often thought of merging plans and, in particular, RPPs.

In addition to concerns with respect to collectively bargained retirement plans, there will be various administrative issues to consider. To the extent that the amalgamating corporations each have separate RPPs and SERPs, even if the plans are not to be merged, each RPP and SERP will have to be amended so as to ensure that the employees of the amalgamated corporation do not have the right to participate in both plans.

The unintentional triggering of a change of control provision in a SERP by a corporate re-organisation is not uncommon. In these circumstances it may be necessary to obtain waivers or consents from the SERP members to avoid having to fund the arrangement or call a letter of credit.

Often, due to the internal nature of the event, the operation of the provision in the context is discovered late in the process and may cause embarrassment and even serious problems. Accordingly, early awareness of these provisions and, better yet, thoughtful design of the change of control feature when it is adopted is desirable.

Should it ultimately be decided that the SERPs and RPPs should be merged, some of the recent case law (namely the *Transamerica* [15] and *Baxter* [16] decisions) in connection with mergers of RPPs the assets of which are held in trust as well as certain regulatory responses (i.e. FSCO's "moratorium" on mergers and asset transfers) should be kept in mind. The remainder of this section of the paper is devoted to a discussion of these issues.

Transamerica [17]

(a) The Facts

The facts of *Transamerica* are, briefly, as follows. Following the amalgamation of NN Life Insurance Company of Canada ("NN") and Halifax Life Insurance Company of Canada ("Halifax") to form NN Life Insurance Company of Canada ("Amalgamated NN"), NN's and Halifax's defined benefit pension plans were merged. The Pension Commission of Ontario ("PCO") approved the merger on the condition that the assets and liabilities from the Halifax plan trust (the "Halifax Fund") be kept separate from the NN plan trust and liabilities. Notwithstanding this segregation, Amalgamated NN treated the assets of both trusts as a single fund and took contribution holidays based on the surplus in the Halifax Fund.

A few years later, the shares of Amalgamated NN were sold by ING Canada Inc. (the "Vendor") to Aegon Canada Inc. and Transamerica Life Canada (the "Purchasers") who claimed that the Vendor had breached the warranty in the share purchase agreement that all required contributions had been made to Amalgamated NN's pension plan.

(b) The Submissions

The Purchasers submitted that the Halifax Fund assets were only available to pay the pension obligations of the "Halifax employees" (i.e., active and inactive members of the Halifax plan at the time of amalgamation) and could not be taken into account in determining the employer's obligations in respect of anyone who was not a "Halifax employee".

The Vendor submitted that the contribution holiday had no impact on the Halifax employees and that taking the Halifax Fund into account in determining the level of employer contributions to be made to the merged plan did not constitute a breach of the Halifax plan trust.

The lower court agreed with the Purchasers.

(c) The Decision

The Court of Appeal upheld the lower court decision. It found that "the clear terms of the Halifax

Trust precluded any part of the capital or income of the fund from being diverted to any purpose other than the exclusive benefit of the beneficiaries of the Halifax Trust" and that Amalgamated NN was obliged "by the terms of the Halifax Trust and by the terms of the undertaking it gave to the PCO to maintain the assets of the Halifax Trust separate and apart from the other assets and liabilities" of the Amalgamated NN's pension plan [par. 7]. It rejected the Vendor's argument based on *Air Products* , holding that the lack of present entitlement of the Halifax employees to surplus did not justify the use of that surplus by Amalgamated NN for a purpose contrary to the terms of the trust.

What is most problematic for future (and potentially past) pension plan mergers in Ontario is the Court of Appeal's dismissal of Justice Grange's comments in *Heilig v. Dominion Securities Pitfield Ltd.* (" *Heilig* "). [18]. In that decision, two companies, each of which sponsored a defined benefit pension plan, amalgamated. The amalgamated company withdrew surplus from one of the plan funds and merged the two plans effective as of the date of the corporate amalgamation. The members of the pension plan from which surplus had been withdrawn brought an application for a declaration that the plan in surplus had been terminated as of the date of the amalgamation and an order directing that the amalgamated company repay the withdrawn surplus with interest (which the amalgamated company undertook to do before the hearing of the application). The members were successful at trial but lost on appeal.

In rejecting the notion that a plan merger effects a termination of the plan, Justice Grange stated in *Heilig* that:

I see no reason why the two pension plans of merging companies cannot be merged into one continuing plan just as the two companies amalgamate into one continuing company. Certainly, there can be no loss of benefit for the beneficiaries of either plan without their consent. But that does not happen in the merger of plans such as that in the case at bar. It makes no difference that one plan may be in surplus and the other not. There is no obligation for an employer contribution until actuarial figures require it. The merger is not unlike the situation resulting from an expansion of the company staff and a large influx of new members to the plan. [pp. 399, 400.]

The Court of Appeal in *Transamerica* held that *Heilig* posed a very different issue and that Justice Grange was not addressing the question at bar. His comments, which were *obiter* , were found to be of no assistance.

FSCO's "Moratorium" on Mergers and Asset Transfers [19]

FSCO reacted to *Transamerica* by adopting its policy regarding the inter-plan transfer of assets. This policy provides that a transfer of assets on sale or merger may be favourably considered by the Superintendent only in specified situations:

(i) where the plans have no defined benefit component or are not subject to a trust,

(ii) the receiving plan undertakes to maintain the transferred assets separate and apart, the terms of the transferring plan(s) and trust(s) do not prohibit the transfer and the surplus entitlement language is consistent under the receiving and transferring plans, or

(iii) a court of competent jurisdiction has determined that the transfer of assets is legal and binding and all rights of appeal have been exhausted.

Where the transfer is on a sale, the parties have an additional avenue which is to transfer the assets to a newly established plan where the transfer does not breach the terms of the original plan and trust, a proportionate share of surplus (if any exists at the time) is also transferred (unless the employer clearly owns the surplus in the original plan and the entitlement is demonstrated in the application), and the surplus entitlement language is consistent under the original and newly established plans. If the merger does not fit into one of these situations, it will be "considered on a case-by-case basis" if "it can be differentiated from the *Transamerica* decision".

This is, obviously, a very unsatisfactory state of affairs. In the context of sales of businesses, it could lead to a proliferation of plans since purchasers are unable to have defined benefit pension plan assets and liabilities associated with newly acquired employees transferred from trusteed pension plans to a pre-existing pension plans.

Baxter [20]

Baxter was released on December 1, 2004. Although this decision sheds further light on the developing area of pension plan mergers, a recent settlement in the case means that the Court of Appeal will not be given an opportunity to shed even more light. [21]

(d) The Background

Effective June 30, 1952, National Steel Car Corporation Limited ("NSCC"), the predecessor of National Steel Car Limited ("NSC"), established the National Steel Car Corporation Limited Pension Plan (the "Original Plan"). The Original Plan covered both salaried and hourly employees. It was funded through a group annuity policy between NSCC and the Mutual Life Assurance Company of Canada and annuity contracts with the Canadian government Annuities Branch and, after June 30, 1964, through a deposit administration annuity policy provided by the Mutual Life Assurance Company of Canada.

Effective July 1, 1965, the Original Plan was split into a pension plan for salaried hourly-paid employees of NSCC (the "Salaried Plan") and a pension plan for hourly-paid employees of NSCC (the "Hourly Plan").

On July 18, 1994, the funding arrangements for the Salaried Plan and the Hourly Plan were changed to a pension trust agreement between NSC and the Canada Trust Company (the "Trust Agreement").

On January 20, 2000, NSC advised the members, former members, and retirees of the Salaried Plan and the Hourly Plan that it had decided to merge the two Plans retroactively to March 1, 1999. The notice stated that the merger would not affect the pension benefits earned to date in any way, nor would it affect the way in which benefits would be earned in the future.

On February 2, 2000, an application to transfer the Salaried Plan assets to the Hourly Plan was filed with the Superintendent. In the application, the employer certified that the funding excess remaining in the merged plan immediately after the transfer was such that the funding requirements for the merged plan could be met using these surplus assets.

On November 20, 2000, the Superintendent invited the employer, the appellants (representatives of

certain members and former members of the Salaried Plan), and the United Steelworkers of America to make submissions to the Superintendent on the asset transfer.

In a letter dated March 2, 2001, the Superintendent consented to the transfer of assets of the Salaried Plan to the Hourly Plan.

(e) Plan Provisions

Section 17.1 of the Original Plan expressly permitted mergers:

The Company intends to maintain the plan indefinitely but necessarily reserves the sole right to amend, suspend, segregate, merge or terminate the plan and to change the method of [sic] medium of funding the plan benefits, all as the company may in its absolute discretion, determine. [par. 2] [Emphasis added.]

The 1965 and 1966 versions of the Salaried Plan also expressly granted the right to merge the Salaried Plan.

Effective January 1, 1972, section 18.4 of the Salaried Plan was amended to state:

Should the Plan be terminated, the Company shall not be obligated to make any further contributions to the Plan and the assets thereunder shall be allocated for the provision of the accrued benefits to which members of the Plan, Pensioners, their estates, designated beneficiaries and joint annuitants are entitled in such equitable manner as may be determined by the Company in consultation with the actuary. Such benefits shall be provided in the form elected by Members under the terms of the Plan. Should a surplus remain under the Plan after the provision of all accrued benefits to Members of the Plan, Pensioners, their estates, designated beneficiaries and joint annuitants, such excess funds shall revert to the company. [par. 4] [Emphasis added.]

(f) Tribunal Decision

The appellants requested a hearing under s. 89 of the OPBA with respect to the Superintendent's decision. A majority of the Financial Services Tribunal (the "Tribunal") determined that it did not have jurisdiction to conduct a hearing but the full Tribunal agreed to proceed to consider the merits of the applicants' case in the event the Tribunal was wrong in its conclusion as to jurisdiction. The Tribunal unanimously rejected the appellants' arguments.

(g) The Submissions

The appellants argued before the Ontario Divisional Court (the "Court") that the 1966 version of the Salaried Plan had the effect of establishing a trust in respect of the Plan assets for the benefit of the members of the Plan. They also maintained that the transfer of assets did not protect "other benefits" of the members of the Salaried Plan as required by subsection 81(5) of the OPBA, which reads as follows:

The Superintendent shall refuse to consent to a transfer of assets that does not protect the pension benefits and any other benefits of the members and former members of the original pension plan or that does not meet the prescribed requirements and qualifications.

They submitted that the Tribunal had erred in finding that a pension plan member's interest in surplus is contingent upon termination of the plan and the existence of an actual surplus at that time, and does not fall within the expression of "other benefits" of the members in s. 81(5) of the OPBA.

The appellants also argued that, (i) pursuant to section 81(5), the contributions to the Salaried Plan could not be used in the merged Plan for the benefit of the Hourly Plan because the Salaried Plan members would lose the protection those assets provided for the long-term solvency of the Salaried Plan and that (ii) "other benefits" consisted of the exclusive rights to all the benefits of the contributions to the Salaried Plan and the funding protection built into the Salaried Plan.

The respondents (the Superintendent, NSC and the United Steelworkers of America) argued before the Court that the merger adequately protected the "pension benefits" of the members as defined under the PBA. In a defined benefit plan, the pension promise consists of the promise that the members will receive the benefits as defined under the plan, regardless of the investment performance of the plan fund. The Superintendent had determined that the pension promise was adequately protected by applying FSCO policy A700-251 which requires that the merged plan have sufficient assets to pay all benefits set out in the plan as at the date of merger. The policy contrasts with ordinary course funding of defined benefit plans which may be less than fully funded at any given time, subject to the employer's obligation to make special payments to return the plan to fully funded status.

The respondents submitted that the appellants' claim to an interest in the plan's assets, over and above the assets required to fully fund the pension promise constituted a claim to the actuarial surplus. Pursuant to the Supreme Court of Canada's decision in *Air Products* , even when a pension plan takes the form of a trust, employees cannot claim surplus in an on-going plan.

(h) The Decision

After finding that the Tribunal did have jurisdiction to hear the matter, the Court agreed with the respondents that the appellants' request amounted to a claim on surplus:

The appellants' argument that contributions made to the salary plan are an "other benefit" under s. 81(5) of the PBA imports a defined contribution concept into a defined benefit plan. It implies that the Salaried Plan members have some guarantee respecting the contributions, in addition to the guaranteed defined benefit. In our view, and we agree with the Superintendent, this concept is inconsistent with the very definition of a defined benefit pension plan. In reality, the appellants' claim as to "other benefits" is really a claim to the actuarial surplus. Surplus is neither a pension benefit, nor an "other benefit" under the PBA. Until the right to surplus crystallizes - and the right to surplus does not crystallize upon a transfer of assets - the surplus is simply as expressed in Schmidt, supra, "the excess of the value of the assets of a pension fund related to a pension plan over the value of the liabilities under the pension plan". [par. 65]

The Court then proceeded to examine the relevant provisions of the OPBA. It disagreed with the

appellants that the term "other benefits" in subsection 81(5) includes surplus. It held that since the only types of benefits defined in the OPBA other than "pension benefit" are "bridging benefits" and "ancillary benefits", and since neither of these benefits include pension fund surplus assets, the term "other benefits" can only mean benefits that are provided by a pension plan that are not pension benefits or ancillary benefits as defined in the OPBA:

If the appellants are correct that "other benefits" includes surplus, then an employer would be required to fund a pension fund to maintain the current level of actuarial surplus in the pension plan, a result which in our view is contrary to the specific funding regime set out in the PBA and regulations (see s. 55(1)). [par. 66]

It also held that section 81 of the OPBA does not provide any right to a distribution of surplus upon a plan merger:

In fact, there is an express statement in s. 81(1) that the original pension plan is deemed not to be wound up and that the new plan is deemed to be a continuation of the original plan. Hence, any surplus that is transferred on a merger is not withdrawn, but remains in the plan. This, in our view, is consistent with the reasoning of the Supreme Court of Canada in Schmidt, supra, and indeed is consistent with the regime under the PBA. Surplus is not payable upon retirement or termination of employment or membership in a pension plan. While the plan is continuing, surplus may only be withdrawn from the plan upon the employer's application and with the consent of all the members. [par. 67]

The Court then turned to the applicable jurisprudence and, more specifically, to the Ontario Court of Appeal's decision in *Transamerica* and the Court of Appeal of British Columbia's decision in *Buschau v. Rogers Cable Systems Inc.* , [2001] B.C.J. No. 50 (C.A.) (" *Buschau* "). It concluded that "where the terms of a pension plan in trust permit a merger, there is nothing in the general law of trusts that prevents a merger of trust funds", which is "in line with the Ontario Court of Appeal in *Heilig* ". [22]

The Court distinguished *Transamerica* based on its finding that the Salaried Plan was not subject to a trust until 1994 at which time the Salaried Plan provided that the employer was entitled to surplus.

In the case before us, we are not persuaded the appellants have established either that the salary plan was subject to a trust, or that the specific terms of any such trust (if indeed there was one) precludes the merger. To the contrary, at all material times, both merging plans expressly permitted a merger and the merger simply restored the unified plan that was originally established in 1952. [par. 70]

In addition, far from imposing the condition that the trust funds be kept segregated, as had the PCO in *Transamerica* , the Superintendent had approved the asset transfer unconditionally.

The Court distinguished *Buschau* by holding that the Court of Appeal of British Columbia:

did not hold that the specific terms of the trust preclude a merger, rather, in the specific circumstances of that case, where the fund subject to the trust was closed and the beneficiaries sought to obtain distribution of the trust funds under the rule of *Saunders v. Vautier* , the beneficiaries were entitled to segregation and an accounting of the assets to which they had

established their beneficial entitlement. In other words, the merger proceeded, subject to this segregation and accounting. [par. 72]

With due respect, although the Court of Appeal of British Columbia did not specifically say that the pension trusts in *Buschau* could not be "merged", it is difficult to find any other meaning in its decision that the members of the Premier Plan (one of the pre-merger plans) had the right to invoke the rule in *Saunders v. Vautier* to collapse the Premier Plan trust than that the Premier Plan trust had and could not be merged with the other pension trusts:

The Plan has long been closed, and the only question is whether the right that belonged to Premier Plan members as a class prior to merger by virtue of the rule in Saunders v. Vautier still exists, or whether that right was diluted (probably to the point of extinction) by the merger down to a right shared with all 4,300 members of the RCI Plan.

In my view, the right of the members of the Premier Plan to invoke Saunders v. Vautier (or for that matter I suppose, the Trust and Settlement Variation Act, R.S.B.C. 1996, c. 463, if applicable) in respect of the Premier trust remains unaffected by the merger, just as their rights to receive the Premier Plan surplus on termination of the Premier trust continues notwithstanding the merger. [par. 67, 68]

These pronouncements follow a discussion of the meaning of the merger of pension plans as opposed to the merger of pension plan trusts in which the Court of Appeal states that "it is difficult indeed to segregate conceptually the Premier Plan from the Premier trust in terms of merger." The implication is that its use of the term "merger" should be read to refer to the merger of the pension plans. The Court of Appeal of British Columbia commented on its decision in *Buschau* in *Bower v. Cominco Limited* , [23] (" *Cominco* ") where it stated that:

As I read Buschau, the court accepted that pension plans and their funds may be merged provided that the terms of the plans and the trusts permit such a union. Where funds are held in accordance with a trust which specifically devotes the corpus of the trust to the exclusive use of the beneficiaries, it follows that the fund may not be used for any other purpose. Merger is not permitted in that case. [par. 74]

(i) The Possible Implications

The facts in *Baxter* were unusual: (i) the Original Plan referred to the possibility of a merger, (ii) the Original Plan was funded through an insurance contract, (iii) the Original Plan was amended to provide to the Company ownership of surplus on termination of the Plan while the Plan was still funded through an insurance contract, and (iv) the splitting of the Original Plan into two occurred while it was still funded through an insurance contract. Indeed, short of an explicit right to merger in the original plan documentation, it is difficult to imagine a fact pattern more favourable to the Company where the pension plan assets are held in trust at the time of the merger. Clearly, *Baxter* would not have been considered under one of the listed situations in the policy but could have been considered on a case-by-case basis, (as could most merger applications given that most situations can be distinguished from *Transamerica* by virtue of the unusual undertaking given to the Pension Commission of Ontario by the plan sponsor in that case.)

Baxter does what no merger decision thus far has done – consider the role of statutory law and the regulator in permitting pension plan mergers. Sections 80 (in the context of the sale of a business) and 81 (in all other cases) of the OPBA authorizes the Superintendent to consent to transfers of assets except where the transfer "does not protect the pension benefits and any other benefits". As discussed above, the Court found that pension plan members have no right to a distribution of surplus under those provisions. The issue is really whether the fact that pension plan members have no right to a distribution of surplus under these provisions completely eliminates any right, in all circumstances, which may exist in equity which would impede or even prevent the commingling of pension assets from different trusts. A secondary issue is whether the regulator has the capacity to decide whether any such rights exist and whether the merger is sufficiently protective of those rights.

The Court did not delve into these questions because of the favourable fact pattern in this case. If the common law does not normally allow the merger of pension trusts, except under special circumstances such as in *Cominco* (where the provisions of the Pension Fund Society were held to "inform the provisions of the trust") or in *Baxter* (where the provisions of the plans provided that they could be merged), then the courts will have to decide whether the commingling of pension assets in a "merger" may be allowed by the regulator outside of these fact patterns, or whether such commingling cannot, by definition, be sufficiently protective of all existing rights. Due to the fact that pension trusts are dynamic and the beneficiaries of pension trusts are determined as a class, it should be possible to add newly acquired employees, who fit within the class of beneficiaries, to a pension plan and have their past and future benefits funded from the pension trust. If this is the case, then there should be no real impediment to merging two pension trusts and the Ontario Court of Appeal's decision in *Heilig* should eventually be recognized as a correct statement of the law in this area.

Given that the appeal in *Baxter* has been abandoned, FSCO will have to decide in the short to mid term what, if any impact, the Court's decision has on its policy regarding the inter-plan transfer of assets and whether such policy should be revised Even if FSCO decides against this, *Baxter* will serve as an example of a situation where FSCO should approve a merger of trusteed plans while still giving consideration to what it believes the Court of Appeal's decision in *Transamerica* means. One can only hope that a new case will come along to further develop this area of the law and give further guidance to pension plan sponsors who struggle to manage these increasingly troublesome benefits.

Other Options

To avoid some of the potential controversy that the merger of DB RPP trusts may cause, other options may be available. One possibility which may be worth exploring is the "wrap around" technique. This would involve amending the overfunded DB RPP to admit to it the members of the underfunded DB RPP, which may involve broadening the class of beneficiaries, and to ensure that all benefits in respect of these new members will be provided by the overfunded DB RPP's trust less any benefits payable from the trust of the underfunded DB RPP pursuant to the terms of that plan. A concurrent amendment would be made to the underfunded DB RPP so that no future service may be credited thereunder. This technique may or may not eliminate the need to contribute to the underfunded DB RPP but does eliminates future service liabilities and may reduce past service liabilities of such plan but the applicable pension standards legislation should be reviewed to ensure its effectiveness.

3. Asset Purchase and Sale Transactions in Respect of Pension Matters

The treatment of pension matters is merely one subset of the whole employment relationship which must be dealt with under any asset purchase and sale and, therefore, the issues which emerge in the pension context must first be dealt with in concert with the overall "deal" in connection with employment obligations.

(a) Context of Benefits Issues in Asset Sale/Purchase

Typically the purchaser will be required to offer employment to the employees and the issue will be whether that offer of employment must be on terms and conditions which are "identical" to the existing terms and conditions – which may be required as a result of collective bargaining agreements – or whether there is latitude for differences in the programs to be provided by the purchaser. A second issue, and the one which has perhaps the greatest impact on the pension treatment in such a transaction, is to what extent, if any, the past service benefits rights of the employees will be honoured by the purchaser.

(b) Registered Pension Plans

Because RPPs are prefunded, the decision to assume past service liabilities is a critical one because this is normally accompanied by a transfer of the assets already allocated in respect of the transferring employees. Past service obligations are not really a major concern in connection with DC pension arrangements but are a real issue with respect to DB programs, particularly because the employees often will be adversely affected if past service is not recognised.

The range of options for dealing with RPPs is as follows:

- Purchaser provides no DB RPP.
- Purchaser provides a DB RPP but does not recognise past service and there is no asset transfer.
- Purchaser provides a DB RPP and recognises past service but there is no asset transfer.
- Purchaser provides a DB RPP, recognises past service and there is a transfer of assets.

Returning to the past service issue, even in a simple flat benefit plan for a collectively bargained workforce this can be important to the employee. For example, if the flat benefit level is $40.00 per year of service on the date of sale but might rise to $60.00 per year of service at the end of 20 years when the employee retires, whether all years of service or only post-closing years of service are recognised by the purchaser can yield a significant difference in the employee's benefit. A numerical example may illustrate this:

- John Doe has 10 years of service with the vendor pre-closing and 20 years of service with the purchaser post-closing.

- If all 30 years of service are considered at the $60.00 level, then the employee's monthly benefit would be $1,800.00.

- However, if past service with the vendor is not recognised under the purchaser's plan (which may raise its own collective bargaining issues), and the responsibility for the past service benefit remains with the vendors, the total benefit will be the aggregate of the amount payable from each of the vendor's and the purchaser's pension plans as follows:

  Vendor's Plan - 10 years times $40 equals $400.00/ month plus

  Purchaser's plan 20 years multiplied by 60 equals $1,200.00/month

  Total equals $1,600.00/month.

- Thus our fictional employee would lose out to the extent of $200.00 per month as a result of the non-recognition of the past-service under the purchaser's pension plan.

Assuming the RPP is bargained, either the purchaser will recognise the past service but not insist upon a transfer of assets from the vendor's plan (and thus would bear a total obligation of $1,400.00 per month to satisfy our fictitious employee instead of only $1,200.00 in the pro rated example and has to do so without the benefit of the assets already contributed to the vendor's plan in respect of the employee) or it will insist upon an asset and past service liability transfer.

Once an asset transfer is decided upon then the "fun" begins. The vendor and the purchaser will have to negotiate the actuarial basis for the transfer, taking cognizance of the pension standards regulators guidelines that are issued from time to time, and may also have to deal with the thorny issue of surplus. These are various approaches to valuing asset transfers. One method is simply to provide that the assets to be transferred will equal the liabilities. However, there are two broad bases to measure liabilities and different methods and assumptions may be adopted too. If the plan is precisely fully funded and the parties can agree on the basis then this should not be a problem. But if the vendor's plan is grossly underfunded then the regulators may only consent to the transfer if the vendor makes a special contribution to its plan prior to completing the asset transfer so that the remaining plan members are not adversely affected by the transfer (i.e. their benefits should not be less well funded after the transfer is made). If the plan is overfunded then the regulator may first question why a share of the surplus is not being transferred (and if it is not then query whether the employees are to be given an interest in any subsequent surplus sharing from the vendor's plan, despite the asset transfer). Another transfer basis that may be approved by regulators is to provide that the transfer will be based on the funded ratio of the pension plan so that if that ratio is 110% then an amount equal to 110% of the assumed liabilities is transferred and similarly if it is 80% then an amount equal to 80% of the assumed liabilities is transferred. The latter is considered fair because the funded status of the employees and others remaining in the vendor's plan remains the same and the ratio for the transferring employees also remains the same.

Finally, of course, if surplus is transferred then there will be the issue as to how much and how much it is worth. Because surplus is transient, based on investment performance and actuarial assumptions, and it may really only be useful for contribution holidays, a purchaser will rarely pay dollar for dollar for surplus.

(c) SERPs

The treatment of supplementary pension arrangements may be a precise parallel of the registered pension benefits – particularly since the ITA provisions concerning RCAs now provide for interplan asset transfers. [24] However, few if any RPPs contain change of control provisions while many SERPs contain such features. Accordingly, the existence and effect of any such provision must be established.

Part III – Restructuring in Insolvency

1. Background

(a) Technical Aspects of Pensions Law in Insolvency

In the context of insolvency proceedings, pension plan related issues which demand time and attention are generally restricted to DB RPPs, although there could also be some implications for SERPs. The main issues relate to dealing with significant deficits as well as cash flow problems associated with funding DB RPPs. Essentially a DB RPP represents a promise to pay a certain benefit at a future point in time. As discussed in Part I of this paper, the amount of the benefit is determined by reference to a specified benefit formula or a percentage of earnings.

It must be appreciated that there are various types of employer pension contributions – in general terms, these will often relate to (a) the actuarial basis for the determination of plan liabilities, and (b) whether the contributions related to "past service" (to fund deficiencies in respect of past pension obligations and often referred to as "special payments") or current service (to fund obligations for the current period). The following discussion is a simplified description of very complex actuarial and statutory issues. Expert actuarial advice should be obtained to explore the details and nuances of these issues. With respect to the actuarial basis, the DB RPP will be valued both as if the plan and the corporation is ongoing ("a going concern basis") and as if the plan is terminated (giving rise to a solvency valuation or wind up valuation; the term solvency will be used herein) – with different actuarial methods and assumption prescribed or customary for the different bases. Currently, a solvency valuation gives rise to greater liabilities in most pension plans than does an ongoing valuation and so solvency funding gives rise to greater periodic contributions.

The employer's contribution amount to fund a DB RPP is determined by an actuarial report. The actuarial report will determine the current funded status of DB RPP and estimate the necessary level of contributions to meet any current service and past service obligations on each of a going concern and solvency basis. Any funding deficiency identified in the actuarial report is amortized over a prescribed period (five years on a solvency funding basis and fifteen years on a going concern basis). Generally, pension legislation requires actuarial reports to be filed on a triennial basis and the actuarial reports are "good" for the duration of that period, but in some instances more frequent updating of the actuarial report is required [25] or undertaken on a voluntary basis. Regardless, the administrator must file the report within nine months of the valuation date (which usually results in the filing of the report by September 30 since actuarial reports are typically prepared on a calendar basis). Until the new actuarial report is filed, the amount of the contributions will continue based on the "old" valuation report. Depending upon any number of relevant factors, the contributions actually required for a period will be greater or lesser under the new valuation than under the old

valuation. Where the contributions increase under the new report, within 60 days of the filing of the report, the difference between the amounts actually contributed and those called under the new report must be remitted. This can often be in the millions or tens of millions of dollars and so when cash reserves are limited attention to this possibility is required. [26]

In Ontario, contributions are to be remitted monthly (quarterly, under federal pension legislation) in arrears. When an actuarial report indicates that the plan is in a surplus position the employer may be permitted, subject to the language of the relevant plan and trust documents, to take a "contribution holiday" whereby the actuarial surplus is used to fund the employer's current service obligations.

(b) Deemed Trust and Statutory Lien

In Ontario, certain deemed trusts are created under the OPBA [27] in favour of the plan beneficiaries with respect to:

- source-deducted employee contributions until the money is paid into the pension fund;
- employer contributions which are due, but which have not yet been remitted; and
- where a plan is wound up in whole or in part, an amount equal to the contributions which have accrued to the date of the wind up, but are not yet due (commonly referred to as "stub period" contributions).

The administrator of the pension plan is also provided with a lien and charge on the assets of the employer, in an amount equal to the deemed trusts. [28]

The deemed trust and statutory lien under the OPBA are enforceable against the employer outside of insolvency proceedings and may adversely affect the priority status of preferred creditors. For example, under the *Personal Property Security Act* , [29] a security interest in an account receivable or inventory is generally subordinate to the interest of a person who is a beneficiary of a deemed trust under the OPBA. Although the law is not clearly and absolutely settled, I believe the conventional thinking surrounding these OPBA deemed trust and statutory liens is that, in the context of proceedings under both the *Companies' Creditors Arrangement Act* [30] (the "CCAA") and the *Bankruptcy and Insolvency Act* [31] (the "BIA"), the statutory lien of the administrator remains enforceable. The deemed trust, by way of contrast, remains enforceable when a company attempts to restructure under the CCAA, but is conventionally considered to be unenforceable in proceedings under the BIA. [32]

Of particular note to secured creditors will be the fact that the courts have determined that the deemed trust created under the OPBA does not extend to the unfunded pension liability upon wind up of the plan, but is limited to the outstanding unremitted contributions that are past due plus those arising in respect of the stub period. [33] Accordingly while the entirety of the pension fund shortfall remains an obligation of the employer, and an obligation exists under the OPBA to fund this deficiency over a period not exceeding five years from the date of windup [34], at present this is an unsecured claim on the assets of the debtor.

Despite the foregoing, a private members bill, Bill C-281 [35], could turn the priority of secured

creditors on its head by establishing a super priority status for outstanding employee claims, including pension benefits. First introduced in November 2004, Bill C-281 was debated at second reading in December 2004, although currently, the progress of the bill appears to have stalled. In its current form Bill C-281 would establish priority status for all pension funding shortfalls in bankruptcy proceedings by amending the BIA [36] to provide workers with first priority to the proceeds realized from the property of the bankrupt with respect to wages/salaries, severance/termination pay and unfunded pension liabilities. These amounts would be deemed to be a first charge on every realizable asset of the bankrupt, despite any security taken or granted to any other person. Furthermore, the bankruptcy trustee would be required to make any payments owed by the bankrupt to a pension plan so as to eliminate all unfunded liabilities of the plan and allow the pension plan to immediately satisfy all of its obligations to every member of the plan. Unless the bankruptcy proposal provided for payment of these benefits immediately upon its approval, the bankruptcy judge would not be permitted to approve the proposal.

While the future of Bill C-281 remains uncertain, it has been championed and would obviously be welcomed by plan members as protection of their pension benefits. On the other hand, sources of financing for companies with one or more significant DB RPPs may be restricted and even dissipate entirely where there is a significant risk of an underfunded plan as secured lenders seek to manage the new risk that would exist vis-à-vis unfunded pension liabilities.

It should be noted that Bill C-281 makes no reference to proceedings under the CCAA, therefore, leading to the presumption that the deemed trust and statutory lien analysis would continue to apply.

(c) Pension Benefits Guarantee Fund

The Pension Benefits Guarantee Fund ("PBGF") was established in 1980 to guarantee the payment of certain pension benefits, [37] in respect of employment in Ontario, upon the full or partial wind up of a qualifying [38] pension plan. Ontario is the only jurisdiction in Canada to offer such a program. Under the OPBA, [39] the Superintendent must declare that the PBGF applies to a qualifying plan when all of the following four conditions are met:

- the plan is registered under the OPBA;
- the plan provides defined benefits that are not exempt by the OPBA or the OPBR;
- the plan is wound up in whole or in part; and
- the Superintendent is of the opinion, upon reasonable and probable grounds, that the funding requirements of the OPBA and the OPBR cannot be satisfied.

As a result, there are essentially two discretionary elements to the application of the PBGF. The first, which is really discretionary in only a very limited way, is that the plan be wound up. This need not be discretionary since an employer can cause the plan to be wound up or the Superintendent may cause the plan to be wound up, [40] provided one of several enumerated grounds for a wind up order [41] under the OPBA exist (e.g. the bankruptcy of the employer or a failure to make contributions to the pension fund). The second element of discretion, and the one that is really more meaningful, is the Superintendent must form the "opinion" that the funding requirements of the OPBA cannot be satisfied. Presumably, the Superintendent could not help but form the opinion

that the funding requirements cannot be satisfied if the employer is insolvent and does not have resources to make contributions to the plan.

When the PBGF is found to apply, the Superintendent is required to allocate from the PBGF and pay to the plan sufficient amounts when combined with the assets of the plan to provide the guaranteed benefits as determined by the formula set out in the OPBR. [42] The total liability of the PBGF is limited to the assets of the PBGF, [43] however the OPBA [44] permits the Lieutenant Governor in Council to authorize the Treasurer of Ontario to make loans out of the Consolidated Revenue Fund to the PBGF.

Historically, is has been a rather lengthy process to get to the stage where there is actually a payment out of the PBGF. However, on October 28, 2004, FSCO announced that it is making changes to the PBGF allocation process. Among the goals of the new process was to alleviate financial instability as a result of reductions to members' pension benefits and to expedite the transfer of funds from the PBGF to the qualifying plan. An application to the PBGF for the allocation of funds can be made once (1) the plan is declared or ordered to be wound up and (2) the Superintendent has issued a declaration that the PBGF applies to the plan. To speed up the process, the plan administration may apply for a wind up order and a PBGF declaration simultaneously. However, under the old process, a completed wind up report was required to support a declaration that the PBGF applied and for an allocation of funds from the PBGF. This requirement frequently led to delays associated with the preparation of the wind up report. Under the revised PBGF allocation process, an actuarial statement will be accepted by FSCO in lieu of a wind up report for declaration and allocation purposes under the PBGF. The revised process will also require that pension benefits to retirees be immediately reduced to the PBGF level, and not the funded level of the pension plan.

To the extent that the PBGF advances money to the pension plan to provide guaranteed benefits, the Superintendent is given a lien and charge over the assets of the employer in an equal amount [45] and the Superintendent is subrogated to the rights of the plan administrator, including the deemed trust and statutory lien claims against the employer with respect to unremitted contributions etc. [46] However, whether the lien and charge in favour of the Superintendent will not remain enforceable in the context of CCAA or BIA proceedings is a matter of heated debate given the specific provisions of the CCAA and the BIA applicable to claims of the Crown. [47]

Despite the potential changes to the PBGF allocation process, in actual fact, the insolvency process may well be complete and the assets of the employer paid out long before any payment is made from the PBGF to the pension plan. However, it should not be discounted that one of the secondary purposes of the recent changes to the PBGF allocation process were to improve the chances of asserting a deemed trust or statutory lien claim. Given that there is still a great chance that the Superintendent will have no deemed trust or lien to assert (as contemplated by the OPBA) prior to completion of the insolvency process, it causes one to consider the question of whether the Superintendent will try to assert itself as a creditor or in some other capacity in the process of insolvency either before the plan has even been wound up or after the plan has been wound up, but before any funds have been advanced from the PBGF. The answer is "Yes". In recent materials filed in certain insolvency proceedings, the Superintendent has disclosed that very intent.

Although it remains to be seen how compelling a court will find such arguments, the basis (in simplified terms) is as follows:

- delinquent contributions or foregone contributions to a pension plan represent a "funding"

of the restructuring by the plan beneficiaries and the "equities" favour granting some priority to these amounts; [48]

- if the plan(s) have already been wound up (a rare occurrence) and are underfunded then it may be a virtual certainty that the PBGF payment in respect of the plan(s) will be made and it is only a matter of time before the statutory pre-conditions to the "PBGF" lien exist;
- the claim is "secured" and a trust claim;
- pension plan members are "involuntary creditors" and suffer a retroactive loss (since pensions accrue over time).

(d) Director and Officer Issues in Under-Funded Plans

The OPBA contains penal provisions for a breach of the OPBA by a director, officer, official or agent of a corporation and every person acting in a similar capacity. [49] Specifically, a person who "causes, authorizes, permits, acquiesces or participates in" or "fails to take all reasonable care in the circumstances" relating to a corporate offence is guilty of an offence under the PBA. Where this offence is related to the failure to make the required contributions in respect of the plan, the offender may be ordered to pay the unremitted contributions.

(e) Pre-Filing Claims

If a debtor company seeks creditor protection under the BIA or CCAA in order to effectuate a restructuring process, temporary relief, in the form of a stay of proceedings, may be available to protect directors from any liability under the OPBA. Once a notice of intention to make a proposal or a proposal is filed in BIA proceedings, creditors are stayed from commencing or continuing any action against a director of the debtor company that arose before the commencement of the BIA proceedings. [50] This stay of proceedings continues until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt. [51] On the other hand, the power of the court to grant a stay of proceedings under the CCAA is discretionary. [52] A stay of proceedings granted by court order under the CCAA may also be granted to a director from any claim against the director that arose before the commencement of proceedings under the CCAA. The stay continues until a compromise or arrangement is sanctioned by the court or refused by the creditors or the court. [53]

(f) Claims Arising During the Filing

The statutory stay under the BIA and the "basic" order in CCAA will have no effect on pension funding obligations in respect of the post-filing period. Accordingly, a special order to deal both with the employer's contributions to a pension plan and the related officers and directors liability may be sought.

(g) Joint and Several Liability

Companies with plans registered in Ontario but with Quebec Members should be aware of the unique provisions in Quebec's pension legislation, the *Supplemental Pension Plans Act* [54] ("SPPA"), pertaining to multi-employer pension plans ("MEPP"). In particular the SPPA [55] provides that a pension plan in which employees of affiliated companies participate is a MEPP unless (a) all of the corporations are affiliated and (b) the "plan provides" that all of the employers that are "parties to the plan" agree that it is not intended to be a MEPP. In such a case, the SPPA provides that each of the employers is jointly and severally liable for the obligations of the other in respect of the plan.

It is unclear how the joint and several liability requirement will be applied. In the case of a pension plan where there are multiple employers with employees in Ontario and Quebec in the pension plan, the application of the joint and several liability requirement is unclear. For instance, does it apply to obligations for only Quebec employees or does it apply to all plan members? In addition, if an employer has only Ontario members in a plan, can it nonetheless be held to be jointly liable with respect to the obligations of the Quebec employees in the event that the non-Quebec employees do not enjoy the fruits of this joint and several liability requirement?

It seems reasonable to anticipate (but far from certain) that a court would not find the Ontario employees enjoy the benefit of this provision and, therefore, the joint and several obligation should only apply to contributions with respect to the deficiency fro the Quebec employees. The last issue is really whether a non-Quebec based employer with no Quebec employees would be held to be jointly and severally liable under the provision. Common sense would suggest that if its employees do not enjoy the benefit of the contribution, then an employer should not bear the cost. It is expected that all of these issues will be litigated in the Ivaco saga commencing later this year.

(h) "Irreconcilable Differences"

One of the fundamental, underlying issues to appreciate in dealing pension plan liabilities and obligations in an insolvency restructuring effort is that the structures of the insolvency statutes and the structure of the pension standards statutes relating to funding of pension plans are based on fundamentally different notions. The pension standards legislation accommodates the fact that from time to time or at any particular point in time a pension plan will not be fully funded. However, these statutes are designed to require periodic reports taking a snapshot of the pension plan funded status and requiring a re-visitation of the levels at which future contributions will be required to meet past service promises. Indeed, it is the continual and continuous notion of pension accruals in a defined benefit plan which underlie the fundamental distinction with the insolvency statute. In a pension plan, while a contribution designed to pay for the accrual of a current service benefit is intended to satisfy that obligation, it may well turn out in the future that that obligation (now a past service obligation) may not be fully satisfied from the pension fund and so additional contributions (the special payments) are required. The insolvency statutes generally contemplate the notion of a "pre-filing claim". From an insolvency statute perspective, the entire accrued liability under the pension plan should be a pre-filing claim. However, the pension standards legislation and pension practice does not so easily unbundle the past and future elements of the pension promise – at least in respect of ongoing active employees – and calls for a continued revaluation of the assets necessary to meet that liability. Perhaps, it can be argued this has changed as a result of the *Monsanto* decision discussed earlier in the paper, since in one sense *Monsanto* stands for the proposition that

on partial wind ups, individuals should be completely settled out of the pension plan. Under that construct, it isn't quite so difficult to separate various time periods or elements of the pension promise to the affected group of plan members and to "compartmentalise them" and deal with them in the way that many other claims are dealt with. It is suggested that the way in which the competing statutes deal with pensions is either reconciled or decided in favour of the insolvency statutes on one hand or the pension and benefits standards statutes on the other hand will ultimately need to be answered and the resolution of those questions will inform the dealings with the pension issues in these circumstances.

(i) The Human Element

Of course considering these issues in a theoretical light alone fails to capture the key importance of pensions to the workforce (particularly those close to retirement) and the retirees and deferred pensioners. These people rely on the pension to sustain them and it is not surprising that they take these issues very personally. Given that a successful restructuring will be consensual and the pension stakeholders will be involved in that consensus, either through a vote or otherwise, it is fairly obvious that there will be need to engage in an effective manner with the pension stakeholders (including plan members and former members, trade unions (where applicable), pension regulators, governments of various levels who may be involved in legislating or otherwise in respect of a pension deal) to conclude any meaningful arrangement.

2. Restructuring in Insolvency

In recent years there has been much press, particularly with steel companies and airlines dealing with the topic of pension plans of insolvent companies. This portion of the paper is intended to discuss some of the issues that these circumstances present, please note it is beyond the scope of this paper to provide a detailed analysis of these very technical points.

Insolvency restructurings may have two broad outcomes – the successful restructuring, which involves the successful emergence of the corporation (or a successor corporation) from the ashes of the predecessor, or the failure of the effort leading to the effective liquidation of the corporation, either through the means of a receiver or a bankruptcy proceeding. These will be discussed in turn below.

(a) Failed Restructuring

In a failed restructuring where the corporation does not survive, it is quite likely that the wind up of the pension plan will be part of the entire process. Pension plans may be wound up by employers voluntarily at any time (subject to collective bargaining impediments) but may also be ordered to be wound up and terminated by the pension standards regulators. Generally, bankruptcy is a circumstance in which such an order may be issued by a regulator. In addition, failure to remit contributions is typically a circumstance giving rise to an ordered plan windup. Furthermore, downsizings of various levels of significance may give rise to a requirement to partially wind up a plan.

Whether it is a full or partial wind up, the liabilities related to the wind up will be required to be

funded over a period that is typically five years but the period may be shorter in certain circumstances. [56] On a wind up the benefits for those persons affected by the wind up may be settled by way of lump sum transfers or the purchase of annuities. In the event that the business has failed, the continuing funding obligation of a corporation that exists in respect of an underfunded plan will likely not be honoured and the employees will need to have the benefits cut back in accordance with the terms of the plan and applicable legislation.

If the contrary circumstance exists and there is a wind up and the plan is overfunded, then there may be a need to deal with the surplus (see the discussions of *Monsanto* above) and certainly will be a need to deal with it if it is a complete plan wind up. Depending upon the jurisdiction or jurisdictions in which the employees who are subject to the plan were employed, the employer (a trustee in bankruptcy) may be able to obtain a portion of the surplus if it is able to obtain the consent or agreement of the prescribed number of employees.

In the case of unfunded SERPs, an insolvency will likely prove catastrophic as the beneficiaries will qualify only as unsecured creditors and are unlikely to receive any payments. Many SERPs are secured by letters of credit and the good news is that changes to the CCAA to add section 11.2 have removed the uncertainty concerning SERPs and letters of credit arising from an early 1990's insolvency involving Woodwards' department store. [57] In that case a judge issued a temporary stay order on the calling of the letter of credit under his jurisdiction under the statute. With the statutory changes, a SERP secured through a letter of credit should be safe for the employees if properly established and administered.

Finally, if the SERP is overfunded, since it is not an RPP there is a greater likelihood that the creditors will be able to obtain a "refund" of surplus.

(b) Successful Restructuring

If the corporation intends to continue in business after shedding debt or otherwise compromising its liabilities, it is likely to file under the CCAA and seek to restructure its obligations in one form or another. [58] With respect to pensions and benefits matters, we have seen in the 2002 restructuring of Algoma Steel Inc. and in the more recent events involving Air Canada, Slater Steel Inc., Ivaco (query whether Slater and Ivaco qualify as successful), Stelco Inc. and United Airlines that unfunded pension obligations can be a significant burden to troubled employers and it may be necessary to reduce pension obligations or obtain some relief from the normal funding rules.

As more and more restructurings emerge with pensions as a central element, trends are developing. As a matter of very general background (from a pension lawyer speaking to the complex issues in an insolvency), the CCAA generally permits the corporation to compromise pre-filing obligations through the adoption by the necessary majority of stakeholders to the plan of arrangement presented through the process. However, post-filing obligations are not generally compromised through the CCAA process directly but may be altered through consensual arrangements with creditors and stakeholders that may be connected to the plan of arrangement (e.g. entering into a new collective agreement which meets certain cost-saving objectives may be a "condition" to a plan of arrangement). It has generally been acknowledged that compensation to employees in respect of employment in the post-filing period (i.e. current service benefits or future service benefits) can only be dealt with consensually and therefore salary and wages along with benefits are not typically changed during the restructuring period, and in any event are not typically changed without consent

or at least adequate notice. With respect to pension plan contributions, it appeared that prior to 2003 the common approach was to continue funding of RPP obligations in the normal course regardless of the filing. However, more recently, aggressive approaches to pension funding during the CCAA restructuring process have been seen. Some (hopefully) representative "case studies" are discussed in further detail below to illustrate both the approach to funding during and after the filing and to review the other aspects of restrictions.

(i) Algoma I

Algoma I involved the April 1992 restructuring of Algoma Steel Ltd. into Algoma Steel Inc. This "case" also illustrates the relatively recent emergence of pension and benefit considerations as key to a successful restructuring. In this restructuring of Algoma which took place under the CCAA, the pension funding deficiency was not considered a major issue. The major issues in that restructuring were debt obligations of Algoma and environmental issues. With respect to pension and benefit obligations, the only restructuring step was to have all of the rights and obligations under the pension and benefit plans assigned from old Algoma to a new Algoma corporation that was created to facilitate the restructuring. No steps to deal with pension deficiencies were undertaken.

(ii) Algoma II

In April 2001, Algoma Steel Inc. sought and obtained protection under the CCAA for a second time. This proceeding represented by far the most comprehensive and important restructuring involving a corporation's under-funded pension plan. At the time of its filing, Algoma operated two pension plans – one each for its hourly and salaried employees [59] and these plans operated under the so called "Section 5.1 election", being an election under the OPBR which permits employers with a plan or combined plans with assets exceeding $500 million to be excused from making special payments in respect of solvency deficiencies. At the time of the filing, the plans were not fully funded on a solvency basis and in the event that they were to be wound up, the PBGF which would have applied to virtually all of the members of the plan, would not have satisfied the full pension obligations owed to all employee and former employees.

The solution in Algoma involved the following, somewhat simplified, steps These steps are derived from the plan of arrangement that was voted on in respect of Algoma Steel Inc. that was approved and sanctioned by the court on December 19, 2001 as well as from O. Reg. 202/02 which implemented the pension plan restructuring.

1. Algoma spun off new pension plans from the original pension plans, the pension liabilities for the active workforce was assumed by these new plans and assets in respect of such liabilities were transferred from the existing plans.

2. Except as noted in Step 4 below, the obligations for the retirees and the deferred pensioners under the existing plans remained in such plans unamended, except that the provision for future inflation increases which applied to some of those individuals were no longer applicable under the plans. That is, the sole benefit compromise that occurred in the Algoma restructuring in respect of these individuals was that the possibility for future inflation related increases to their benefits was eliminated.

3. The existing pension plans were terminated by Algoma and a new administrator was appointed by the Superintendent. A declaration was to be made by the Superintendent that the PBGF applied to such plans. The benefits under these plans thus were capped at the level guaranteed by the PBGF.

4. With respect to the retirees and deferreds, Algoma implemented a further new pension plan which provided the shortfall in the benefits they would have had from the amended original plan (i.e. taking into account the elimination of future inflation increases) and the amount they actually received from the pension plan that is being wound up under the auspices of the Superintendent and the PBGF. This new "wrap around" pension plan had no assets to begin with and it was a requirement that the funding of such promise be satisfied over a period not exceeding 15 years.

5. Returning to the pension plans for active employees, Algoma did not enjoy a continuing Section 5.1 election in respect of such plans, these are administered by Algoma and were subject of a number of technical amendments which were intended to improve the funded position of the plans. Algoma was required to fund the deficiencies in the plan existing at the date of the pension plan restructuring over a period not exceeding 15 years. In addition, the PBGF does not apply to the new Algoma pension plans (until such time as the initial deficiency has been satisfied) and amendments thereto to improve benefits may not be made except for special early retirement window and plant closure benefits prescribed by the regulation. [60]

6. In addition to the foregoing, there was the creation of a secured claim to a maximum of $100 million subordinated to (i) the "new credit facilities", the "new notes" and (iii) all charges granted from time to time by Algoma for borrowed debt or otherwise in the course of its business in favour of the continuing pension plans that may only be enforced upon Algoma's insolvency and wind up that secured the pension obligations. This security was to terminate on termination of the "new credit facilities".

The key issue in the Algoma restructuring was that the crushing funding deficiencies and pension cash flow burden on Algoma was eased because (a) a large portion of the existing pension plans were, in effect, turned over to the PBGF and it was obliged to satisfy – up to the level of "guaranteed benefits" the pre-existing shortfall in the Algoma pension plans and (b) although Algoma was required to re-commence making solvency deficiency payments to its pension plan, since the Section 5.1 election was no longer applicable, the normal 5 year period for amortization of solvency deficiency payments was stretched to 15 years. It should be appreciated that the "deal" made some commercial sense insofar as the quantum of exposure for the PBGF was mitigated by the fact that no future PBGF claims may be made under the new Algoma plans, at least until they become fully solvent.

An interesting sidebar is that the PBGF itself is funded through premiums collected from pension plans (indeed pension plans with the Section 5.1 election in place contribute several million dollars a year to the PBGF) but the accumulated amount of the PBGF at the time of Algoma II was insufficient to meet what was presumed to be all of the claims of the existing Algoma pension plans and the other claims outstanding thereon. The Lieutenant-Governor in Council is authorized, <u>but not required</u> , to advance by way of loan proceeds to the PBGF; and so in dealing with large claims or potential claims against the PBGF it is necessary to undertaken discussions not only with the Superintendent who oversees the PBGF but also the Province of Ontario to deal with the issue of any backstopping of promises made by the PBGF or agreements made with the PBGF.

(iii) Air Canada

The story of the Air Canada restructuring saga begins with so-called "stress testing" the federal pension regulator (the "Office of the Superintendent of Financial Institutions" or OFSI) performed with respect to the Air Canada pension plans in 2003. In 2001 OFSI began stress testing federally regulated pension plans by projecting the liabilities and assets of a pension plan since the last

actuarial report in order to assess the overall effect of changing market conditions on the solvency ratio of the plan. The solvency ratio is the ratio of plan assets to its solvency liabilities. If the solvency ratio was less than 1, OFSI would then consider various interventions under a unique provision of the *Pension Benefits Standards Act, 1985* ("PBSA") which OFSI has invoked to issue compliance orders where it feels the PBSA has been infringed. [61]

In the case of Air Canada the most recent actuarial reports filed in respect of its plans (which was prepared as at January 1, 2001) indicated that the Air Canada pension plans were in a surplus position of over $915 million. As a result, and in accordance with the actuarial recommendation of that report Air Canada took contribution holidays in 2001 which continued into 2002 and 2003. In early 2003, OSFI's stress testing indicated that all of the Air Canada pension plans were in a deficit position totalling approximately $1.3 billion dollars. Based on these findings, OFSI issued a temporary direction on March 21, 2003, requiring Air Canada to remit contributions representing the normal costs of the pension funds since 2002 and directed Air Canada to cease taking contribution holidays. OSFI also took the position that the contributions that would have been made but for the contribution holidays were subject to a statutory deemed trust. [62] As a result of the temporary direction, OSFI asserted that Air Canada became liable to pay to the pension funds approximately $105 million in respect of the contribution holidays taken in 2002 and approximately $30 million in respect of contribution holidays taken in the first quarter of 2003. In a separate, but related letter dated March 21, 2003, Air Canada was also directed by OFSI to prepared new valuation reports for all Air Canada pension plans to be filed with OFSI by April 30, 2003, despite the fact that the next normal triennial actuarial report was not due until 2004. Air Canada subsequently filed for protection under the CCAA.

Ultimately, OFSI and Air Canada with the concurrence of representatives of numerous pension stakeholders agreed to a funding relief protocol and the pension plan restructuring was implemented by Regulation SOR/2004-174. [63] The key aspects to the restructuring included:

- The period to repay the solvency deficiency was increase from 5 to 10 years.
- A detailed payment schedule set out containing variable annual payments rather than equal annual payments. The earlier years of the schedule require lower payments providing Air Canada some cash flow relief.
- OFSI waived the deemed trusts it maintained were a result of the contributions required by the temporary direction but which had not been remitted by Air Canada. At the time the funding relief protocol was entered into OSFI asserted this amount was approximately $346,616,000.
- In return for OFSI's wavier of the deemed trust, Air Canada issued a secured promissory note, to the trustees of each of Air Canada's Pension Plans, with an aggregate principal amount equal to $346,616,000.
- A number of limitations were put in place including (i) restrictions on actuarial methods (no smoothing of assets to calculate the solvency assets of the plan), (ii) restrictions on the ability to increase pension or other benefits and (iii) a moratorium on contribution holidays.

OFSI has indicated that similar arrangements to those reached with Air Canada could be extended to other companies that enter the CCAA process. Therefore, federally regulated companies who enter the restructuring process could expect some flexibility on the part of OFSI regarding the funding of

pension deficits.

(iv) Slater

On June 2, 2003, Slater Steel Inc., Slater Stainless Corp., Sorel Forge Inc., 833840 Ontario Inc., 1124207 Ontario Inc. and 3014063 Nova Scotia Company (collectively referred to as "Slater") made an application under the CCAA and an order was granted providing, among other things, a stay of proceedings against Slater. Prior to the stay being granted, Slater's pension plans were in a deficit position as indicated by the most recent actuarial valuation prepared as at December 31, 1999. Under this report, the aggregate annual contributions required to be made for all Slater pension plans was approximately $4.1 million. Slater was advised by its actuaries that the pension obligations under the next triennial actuarial valuation (as at December 31, 2002) were forecasted to increase significantly. The annual contribution (for current service costs and special payments) was expected to increase to $12.2 million annually and a one time payment of $5.9 million, which would immediately become due upon the filing of the new actuarial reports, was expected to cover the increase in normal and special payment contributions for the current year until the report is filed with FSCO (from January 1, 2003 to September 2003).

In light of these funding obligations Slater took the position, based on revised cash flow protections, that it would not have sufficient funds in the short term to satisfy the payment due immediately upon the filing of the new actuarial reports or in the long term to satisfy the ongoing pension contribution obligations. Further complicating Slater's problems was the hesitation of the DIP lenders to provide Slater with any further financing. Slater's was also advised by its major secured creditors that they were not prepared to accept any of the risk associated with the deemed trust, statutory lien or director's charge liability which could adversely affect the priority of their security interest.

Faced with a poor cash flow situation and a lack of additional sources of funding Slater sought an extension of time from filing the new actuarial report until the expiry of the stay of proceedings under the CCAA. Formal requests to both the Ontario and Quebec pension regulators for an extension of the date for filing the new actuarial report were rejected on the basis that in each case the regulator had no authority to extend such time period. Slater then turned to the court for relief, requesting a suspension of the time period for the filing of actuarial reports until 45 days after the expiry of the stay of proceedings.

On September 15, 2003, Slater obtained an order which essentially granted its request. The comprehensive order allowed Slater to continue funding – on both a going concern and solvency basis – at the level it had been "doing" prior to the CCAA filing until 15 days after the termination date of the stay of proceedings. The issues surrounding the deemed trust, statutory lien and the directors' liability were also addressed. The relevant portions of the order are reproduced below:

4. THIS COURT ORDERS that,

(a) any obligation upon any of the Applicants, their directors, officers, employees or any other person to file triennial actuarial valuation reports in respect of the following registered pension plans (collectively, the "pension Plans) be stayed until a date which is 15 days after the Stay Termination Date:

...

(b) none of the Applicants, and 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 during the Filing Stay Period that they might otherwise have become required to make to any of the Pension Plans but for the stay provided herein; and

(c) no lien or trust shall arise and no claim, lien or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants that removes assets from the estate of the respective Applicant or that otherwise has priority over the claims of the existing Security of the Senior lending Syndicate and the DIP Charge of the DIP Lenders as set out in the Initial Order as a result of failure of any person to make any contribution during the Filing Stay Period that they might otherwise have become required to make to any of the Pension Plans but for the stay provided herein.

It is interesting to note that the court order is in the nature of a stay in respect of the obligation to file a new actuarial valuation report but appears to be a complete exemption from damages or obligations of any sort including statutory obligations with respect to failures to contribute during the filing stay period with respect to the contributions that would otherwise have been required to be made as a result of the "new" report and similarly no lien or trust will be recognised arising from such distinction and contributions. What all of this suggests is that the pre-filing claims remain and the claims which arise in respect of contributions that would have been required under the old actuarial valuation remain but that the additional amount of contributions that would have been required had the new report been filed will not give rise to a deemed trust or to other actions against the directors or Slater itself.

The assets of Slater were ultimately sold by way of asset sale in 2004, the CCAA proceedings terminated in August 2004 and a receivership order was issued. Claims against the Slater directors with respect to pension deficiencies have been advanced and rejected at the level of the Superior Court Judge presiding over the CCAA but leave to appeal to the Ontario Court of Appeal was granted on December 16, 2004.

(v) Ivaco

Not less than two weeks after the Slater order was issued, a similar motion arose from the CCAA restructuring of Ivaco Inc., Ivaco Rolling Mills Inc., Ifastgroupe Inc., IFC (Fasteners) Inc., Ifastgroupe Realty Inc., Docoq (1985) Corporation, Florida Sub One Holdings Inc. and 3632610 Canada Inc. (collectively referred to as "Ivaco"). The Ivaco group plans were faced with an aggregate solvency deficiency of approximately $90 million, unpaid current service contributions of approximately $2.47 million and unpaid past service contributions totalling approximately $10.1 million. After filing under the CCAA, Ivaco continued to pay current service contributions in accordance with the current actuarial report, but ceased making past service contributions. In response to correspondence from the Ontario and Quebec pension regulators concerning Ivaco's failure to remit past service contributions to the plans, Ivaco took the position that it had the discretion under the initial stay order to make its pension contributions in whole or in part and subsequently sought an order to clarify the situation.

Ivaco took the Slater order one step further by obtaining an order relieving it of the obligation to make any contributions except current service contributions. Thus all contributions relating to past service (by definition this includes all solvency contributions) are not to be made by Ivaco during the CCAA stay period. Similar to the Slater order, the order provides for protection (other than for

current cost contributions) against directors liability and the deemed trust and statutory lien for the contributions that would otherwise be required during the stay period.

Developments in the Ivaco matter have continued during 2005 following the sale of the assets of the Ivaco businesses to Heico Companies LLC in 2004 resulting in the assumption by Heico of all of the union pension plans but resulting in the termination and eventual wind up of the salaried pension plans. The business creditors of the Ivaco companies had proposed to petition the companies into bankruptcy and the Superintendent of Financial Services, Ontario had sought to resist this. In a recent judgment [64], Justice Farley rejected the Superintendent's contentions that (a) the pension plan members had "financed" the restructuring by means of the deferral or elimination of the "special payments", and (b) concluded that there was no reason to prevent the creditors from seeking to move the proceedings under the BIA even where the effect of such a step would be to defeat pension deemed trusts and statutory liens.

A number of comments in the judgment are *obiter* but suggest that at least Mr. Justice Farley is inclined to the view that pension funding deficits are pre-filing claims and to be treated as same regardless of the fact that the special payments needed to amortize deficiencies may be accorded treatment as current obligations under the OPBA. However, that status likely needs to be fully reviewed, as it may be in the pending appeal of this decision, in light of the cases relating to the interaction of federal insolvency and restructuring statutes and provincial statutes governing employment and labour relations matters.

Moreover, in other comments in the decision that are likely *obiter* , Justice Farley (a) seems to indicate that he would not exercise discretion under s. 43(7) of the BIA, as requested by the Superintendent to decline to order the petition as the typical basis for such a refusal does not emerge merely from the reversal of priorities desired by the business creditors, and (b) appears to be inclined to find that both the deemed trust and lien created by the OPBA are defeated under the BIA. However, the judge characterizes these as in the nature of comments and not final ruling. The judge also rejected characterization of the Monitor as a fiduciary in respect of the pension plans and the plan members. Finally, and not least, Justice Farley noted that since no payment have been made from the PBGF, the Superintendent had not effected or perfected its position as subrogee under the OPBA. This is an important comment as it responded to an argument I understand was advanced by the Superintendent that the court should accept as inevitable that there will be PBGF payment and so should consider that additional lien to exist even before an actual payment has been made from the PBGF.

(vi) United Airlines

To this point, none of restructuring case studies consider above were contested by any of the stakeholders. However, a recent pronouncement in the United Air Lines ("United") CCAA proceedings calls into question whether a court will grant relief to a debtor company from its pension obligations during a CCAA restructuring process.

United has been in Chapter 11 bankruptcy proceedings in the United States since December 11, 2002, and on May 14, 2003, United filed an application for an order under the CCAA which granted a stay of proceedings in Canada. Subsequently, on September 16, 2004, United was granted an amendment to the initial order which permitted United to cease its contributions to its pension plans. Previously United had been making the required quarterly payments until the second quarter of 2003. United's rational for ceasing its contributions was the need for additional liquidity during the restructuring process. The September order was not disputed by the CAW and OSFI, however,

United's other Canadian union, the International Association of Machinists and Aerospace Workers ("IAMAW"), did not attend at the motion or consent to the order. Subsequently, in February 2005, IAMAW successful brought a motion to lift the stay of proceedings with respect to United's obligation to make contributions to its pension plans.

The principle rational for granted the IAMAW's motion was the failure of Untied to demonstrate need as had been the case in Slater and Ivaco (e.g., that it did not have sufficient funds to make its pension funding payments or DIP arrangements were such that United could not make the required contributions to the pension plans or that it would lose directors). Based upon the 2004 actuarial report, United was required to make quarterly contributions of approximately $170,000 to its unionized DB RPP which had a solvency deficiency of approximately $202,000. The court observed that compared to the problems in the U.S.A., the size of the Canadian pension obligations were "rather insignificant" and would not have a significant impact on the U.S.A. restructuring. The court also noted that the deferral of pension funding "is not a given right of the company" and it is "achieved on a consensual basis after negotiation".

The removal of United's stay from pension contributions conceivably adds a new dimension to the way pension deficits will be addressed in future restructuring proceedings and the circumstances under which relief may be granted from the rising costs of pension benefits (such as the orders obtained by Slater and Ivaco). Arguably, an automatic stay for pension contributions will not be granted unless the debtor can establish legitimate cash flow or other concerns. However, what standards will be used to make this determination remain to be seen. The situation in United, where the pension obligations were minimal in the context, can be contrasted with the situation in Slater where the pension obligations resulted in considerable immediate and future cash obligations which would have restricted Slater's access to future funding sources and resulted in a serious impediment to the restructuring process. The consent or absence of consent or objection of the plan beneficiaries or their representatives (including trade unions), may also play an increasing role and raises further questions for consideration such as whether a stay from pension contributions will be granted where the company has demonstrated the stay is necessary for restructuring but the stay is contested by a union.

Conclusion

This has been a brief and high level review of the major issues with respect to pensions and benefits that emerge from corporate reorganisations. It is hoped that this paper will be of assistance to the reader. In the event that one is involved in a corporate reorganisation, attention to the specific facts of the event and the law prevailing at the time will need to be reviewed in detail by some one expert in the legal implications of such events. Moreover, the magnitude of today's pension deficits means that many entities seeking to restructure and to return to positive cash flow will need to address the pension issue.

Pension Management in Insolvency and Restructuring

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TAB 5

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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

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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 in-

clude 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

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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)

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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.

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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.

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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

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Appeal held that the doctrine of relation back in s. 71(1) had no application to s. 70(1), and money paid to a judgment 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

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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

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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

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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.

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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;

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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;

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(*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,

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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.

END OF DOCUMENT

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TAB 6

2008 ABCA 1, [2008] 2 C.T.C. 67, 2008 G.T.C. 1128 (Eng.), [2008] A.W.L.D. 582,
[2008] A.W.L.D. 690, [2008] A.W.L.D. 691, [2008] G.S.T.C. 2, 422 A.R. 4, 415
W.A.C. 4, 43 C.B.R. (5th) 35

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Minister of National Revenue v. Temple City Housing Inc.

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

And In the Matter of Temple City Housing Inc.

The Deputy Attorney General on Behalf of Her Majesty the Queen in Right of Canada as Represented by the Minister of National Revenue (Appellant / Respondent) and Temple City Housing Inc. (Respondent / Appellant)

Alberta Court of Appeal

Rowbotham J.A.

Heard: December 20, 2007
Judgment: January 3, 2008
Docket: Calgary Appeal 0701-0335-AC

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Counsel: Jill Medhurst-Tivadar for Appellant

Chris D. Simard for Respondent

Howard A. Gorman for Proposed Debtor in Possession Lender, Echo Merchant Fund

G. Scott Watson for Monitor, Hardie & Kelly Inc.

Subject: Estates and Trusts; Goods and Services Tax (GST); Insolvency; Income Tax (Federal)

Tax --- Goods and Services Tax -- Collection and remittance -- GST held in trust

Leave to appeal from debtor-in-possession order -- Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income

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Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA -- Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Leave to appeal from debtor-in-possession order -- Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Tax --- Income tax -- Administration and enforcement -- Collection of tax -- Priorities and superpriorities of Minister

Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Tax --- Income tax -- Administration and enforcement -- Withholding of tax -- Trust for monies withheld

Corporate taxpayer owed CRA approximately $973,000 in source deductions and GST -- Taxpayer filed petition seeking protection under Companies' Creditors Arrangement Act ("CCAA") -- Petition was granted, including order for debtor-in-possession ("DIP") charge to taxpayer in amount of $300,000 -- CCAA judge rejected CRA submission that deemed trust created by s. 227(4.1) of Income Tax Act gave CRA's claim priority over DIP order -- CRA

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brought application for leave to appeal -- Application dismissed -- CRA did not meet three of four factors for leave to appeal under CCAA -- Point, which CRA sought to appeal, would not be of significance to CCAA practice given amendments to CCAA -- Amendments included provision granting super-priority to DIP financing -- Once this provision was proclaimed in force, jurisdiction to order DIP priorities would not be issue in future CCAA proceedings -- Moreover, point might not be of significance to action itself -- DIP lender had advanced $300,000 to taxpayer in reliance of CCAA judge's order, and it was virtually impossible to "unscramble the egg" by reversing order -- Further, appeal would hinder proceedings in case at bar -- Without order giving DIP lender first priority, no funds would be advanced and taxpayer would be unable to restructure under CCAA.

Cases considered by Rowbotham J.A.:

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) -- considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. Minister of National Revenue v. First Vancouver Finance) 2002 D.T.C. 6998 (Eng.), (sub nom. Minister of National Revenue v. First Vancouver Finance) 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) -- considered

Smoky River Coal Ltd., Re (1999), 1999 CarswellAlta 128, (sub nom. Luscar Ltd. v. Smoky River Coal Ltd.) 237 A.R. 83, (sub nom. Luscar Ltd. v. Smoky River Coal Ltd.) 197 W.A.C. 83, 1999 ABCA 62 (Alta. C.A.) -- followed

Statutes considered:

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

Generally -- referred to

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

Generally -- referred to

Excise Tax Act, R.S.C. 1985, c. E-15

Generally -- referred to

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

Generally -- referred to

s. 224(1.2) -- referred to

s. 224(1.3)"security interest" -- considered

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s. 227(4) -- referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] -- referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47

Generally -- referred to

APPLICATION by Canada Revenue Agency for leave to appeal from order under Companies' Creditors Arrangement Act, granting debtor-in-possession charge to corporate taxpayer.

***Rowbotham J.A.*:**

Introduction

1 Canada Revenue Agency (CRA) seeks leave to appeal a provision in an order made under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), granting the Debtor in Possession Lender, Echo Merchant Fund (DIP Lender), a charge in priority over the claim of the applicant. Should leave be granted, the applicant also seeks a stay pending appeal.

Background Facts

2 The respondent, Temple City Housing Inc. (Temple) is a small private company that manufactures homes and truss beams for homes in Cardston, Alberta. Temple has almost 200 employees but has suffered from a shortage of skilled trade workers which has slowed its production and lowered its revenues. In September 2007, entire sections of production had to be shut down because of the lack of workers.

3 Temple has debts in excess of $5 million and is unable to meet its current obligations. In November 2007, the respondent sought protection under the CCAA in order to carry on business and restructure as a going concern, rather than liquidating its assets.

4 Temple's largest creditor is the applicant, who has claims for unpaid or unremitted employee source deductions for income tax, Canada Pension Plan and Employment Insurance, as well as GST for 2007, which total approximately $973,000.

5 In order to pay its employees and continue carrying on business, Temple requires additional financing. The DIP Lender made loans of $185,000 and $91,500 on the condition that it obtains a security interest in the property of Temple in first priority or super-priority over all other claims, specifically the claim by CRA.

Decision of the CCAA Judge

6 The CCAA judge considered the sections of the *Income Tax Act*, R.S.C. 1985, c. 1, and the *Excise Tax Act*, R.S.C. 1985, c. E-15, that require employers to deduct and withhold amounts from their employees' wages (source deductions) and remit them to the Receiver General. The source deductions are deemed to be separate and apart from the property of the employer in trust for Her Majesty. A deemed trust attaches to the property of the employer both when source deductions are made and if source deductions are not remitted to the Receiver General by their

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due date.

7 The applicant submitted to the CCAA judge and again in this application, that the deemed trust overrides all competing security interests.

8 The CCAA judge held that the Supreme Court of Canada's decision in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] 2 S.C.R. 720, [2002] G.S.T.C. 23 (S.C.C.), was authority that the deemed trust is similar in principle to a floating charge. Thus, although the property of the employer is subject to the deemed trust, Her Majesty's interest in the property did not continue, for example, once property was sold to a third party. She also found that her interpretation was further supported by the definition in the *Income Tax Act*, which states that a "security interest" means "any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a ... deemed or actual trust...". Therefore, she held that Her Majesty's security interest could be treated the same way as any other security interest under the CCAA.

9 Exercising the inherent jurisdiction of a CCAA court, the CCAA judge held that in the circumstances, particularly, given the number of employees affected and the spirit of the CCAA, which is to promote the continuation of the corporation so that it can emerge from insolvency protection, she granted the DIP Lender first priority to the extent of $300,000 over any claims by the applicant.

10 The order under which leave is sought is dated November 23, 2007 at para. 41 provides:

> In particular, the DIP Charge to the extent of $300,000.00 shall have priority over any claims by CRA [Canada Revenue Agency] in relation to unpaid or unremitted employee source deductions and GST as defined pursuant to the *Income Tax Act* and the *Excise Tax Act*.

Proposed Grounds for Appeal

11 The applicant seeks leave to appeal para. 41 of the November 23, 2007 order on the basis that the CCAA judge erred in granting the DIP Lender priority over Her Majesty's deemed trust claims arising under sections 224(1.2), 227(4) and 227(4.1) of the *Income Tax Act*.

Test for Leave

12 The test for leave is well known. In *Smoky River Coal Ltd., Re*, 1999 ABCA 62 (Alta. C.A.) at para. 22, this Court stated that to obtain leave to appeal an order under the CCAA, there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action.

Application

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13 The applicant is unable to meet the test for leave. The point which the applicant seeks to appeal will not be of significance to CCAA practice because the legislation has been amended. Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2nd Session, 2007, received Royal Assent on December 14, 2007. The amendments to the CCAA include specific authority to grant super-priority to DIP financing such as the loan in this case. This provision has not yet been proclaimed in force. However, once it has been proclaimed in force, the issue of the CCAA judge's inherent jurisdiction to order such priorities will not be an issue in future CCAA proceedings. Counsel for the CRA forcefully submitted that despite the amendments, this case is of significance to the practice because, to her knowledge, it is the first time that a court has given priority to the DIP Lender over the CRA's deemed trust. She made several arguments as to why the decision of the CCAA judge was incorrect, assuming that the standard of review is correctness. It seems to me, however, that these arguments, particularly the application of Iacobucci J.'s decision in the *First Vancouver* case, will still have force in future cases where the matter will be largely one of statutory interpretation. I conclude therefore that this particular appeal would not be of significance to the practice.

14 Moreover, the point may not be of significance to the action itself. As counsel for Temple submitted, this is real time litigation. The CCAA judge makes discretionary decisions in a constantly changing situation. Her decision is owed a high degree of deference. The DIP Lender has advanced $300,000 to Temple in reliance on the November 23 order and, in particular, on the lack of a stay of that order. The proceeds have been paid to Temple's employees and suppliers. It is now virtually impossible to "unscramble the egg", as counsel for Temple submitted; in other words to reverse the effect of para. 41 of the November 23 order and to grant the remedy that the applicant now seeks. As was the case in *Canadian Airlines Corp., Re*, 2000 ABCA 238, 266 A.R. 131 (Alta. C.A. [In Chambers]) at para. 32, this appeal may well be moot.

15 Further, an appeal would hinder the CCAA proceedings because without an order giving the DIP Lender first priority over the applicant's claim, the DIP Lender would not advance funds and without the current and future loans, Temple would be unable to restructure under the CCAA and would be forced to close its business.

16 Given that three of the four factors cannot be met, even if the point on appeal is *prima facie* meritorious, the applicant cannot show that there are serious and arguable grounds of real and significant interest to the parties.

Conclusion

17 As the applicant is unable to meet the test for leave, the application is dismissed and therefore, the application for a stay need not be considered.

Application dismissed.

END OF DOCUMENT

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TAB 7

63 C.C.P.B. 125, 37 C.B.R. (5th) 282, 161 A.C.W.S. (3d) 675

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Collins & Aikman Automotive Canada Inc., Re

IN THE MATTER OF the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of COLLINS & AIKMAN AUTOMOTIVE CANADA INC.

APPLICATION UNDER the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Ontario Superior Court of Justice

Spence J.

Heard: September 20, 26, 2007
Judgment: October 31, 2007
Docket: 07-CL-7105

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Counsel: M.E. Bailey for Superintendent of Financial Services (Ontario)

K.T. Rosenberg, M.C. Starnino for United Steelworkers

C.E. Sinclair for National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW -- Canada)

R.J. Chadwick for Ernst & Young Inc., as Monitor of Collins & Aikman Automotive Canada Inc.

A.J. Taylor, K.L. Mah for Collins & Aikman Automotive Canada Inc.

J.E. Dacks for JP Morgan Chase Bank NA

C.J. Hill for Chrysler LLC

Subject: Insolvency; Corporate and Commercial; Labour and Employment; Public

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63 C.C.P.B. 125, 37 C.B.R. (5th) 282, 161 A.C.W.S. (3d) 675

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Motions to amend initial order -- Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") -- Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors -- Court issued initial order under CCAA -- Para. 4 of initial order authorized company to retain further assistants if necessary -- Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") -- Para. 11 authorized company to terminate employees by agreement with other parties or, failing such agreement, to deal with consequences under CCAA -- Para. 26 provided that monitor, by fulfilling obligations under initial order, would not be deemed to be employer of company's employees -- Para. 29 immunized monitor from liability save for gross negligence or wilful misconduct -- Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees -- Superintendent and unions brought motions seeking various relief -- Motions dismissed -- Para. 4 did not provide that further hirings could breach collective agreements -- If hirings did so, aggrieved parties could apparently seek relief under CCAA -- Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order -- Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime -- If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might found motion for relief -- Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so -- CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA -- It was inappropriate for court to exercise its discretion under CCAA to delete "not required" provision, or to order company to make special payments -- This would be contrary to reasonable expectations of company and DIP lender -- DIP lender had changed its position on basis of existing court orders -- Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations -- There had been no objections regarding special payments at time of initial order -- Union's position, that para. 11 of initial order should be made subject to applicable collective agreements and labour laws, was rejected -- Para. 11 did not purport to abrogate collective agreement or labour laws -- No reason was advanced why union could not withhold agreement to company's proposed exercise of para. 11, or pursue matter in court under CCAA -- Para. 26 was not inconsistent with jurisdiction of board under Labour Relations Act ("LRA") to determine whether monitor was successor employer -- Initial order did not purport to determine application of LRA -- Application of para. 26 was limited to monitor's role under initial order -- Court had jurisdiction to grant limitation of liability as set out in para. 29 -- Wording in para. 29 was consistent with limitation of liability given to monitors under standard form model CCAA initial order.

Pensions --- Administration of pension plans -- Valuation and funding of plans -- Deficiency

Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") -- Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors -- Court issued initial order under CCAA -- Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") -- Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees -- Superintendent and unions brought motions seeking various relief -- Motions dismissed -- Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order -- Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime -- If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might found motion for relief -- Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so -- CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA -- It was inappropriate for court to exercise its discretion under CCAA to delete "not required" provision, or to order company to make special payments -- This would be contrary to reasonable expectations of company and DIP lender -- DIP lender had changed its position on basis of existing court orders -- Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations -- There had been no objections regarding special payments at time of initial order.

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Annotation

When Air Canada filed for bankruptcy protection under the *Companies' Creditors Arrangement Act* (the "CCAA") in 2003, there existed virtually no judicial guidance as to how issues surrounding its underfunded pension plans would be treated under the CCAA. But the spate of employer insolvencies and pension plan deficits in the four years since (Slater Steel, Stelco, United Air Lines, Ivaco, General Chemical, etc.) has resulted in many of the issues at the intersection of insolvency law and pension law having been litigated and, for now at least, resolved. *Collins & Aikman* is the latest decision to answer one of the questions as to how to deal with pension issues in a CCAA restructuring.

The issue in *Collins & Aikman* was the validity of the employer decision to suspend special payments (i.e. contributions to pay down pension plan solvency deficits) on the basis of a provision in the initial CCAA court order stating that the company could, but need not, make pension plan contributions while under CCAA protection. The suspension of the special payments (but not current service contributions, which have continued to be remitted) was a condition of the interim financing designed to keep the insolvent company afloat during its restructuring, the terms of which financing were approved by the court. Neither the Ontario pension regulator nor the union opposed the financing, but they subsequently challenged the suspension of the special payment remittances to the pension plans.

The Ontario Superior Court held that the regulator and union could not have their cake and eat it too, i.e. they could not give the company the benefit of the interim financing while not allowing it to meet a key condition for that financing. Thus the validity of the "pension contribution suspension" provision in the initial CCAA order, which has become a relatively standard feature of such orders over the past few years, has been upheld, to the general relief of employers, financial institutions, and many other classes of CCAA stakeholders.

However, the decision is not necessarily a blanket endorsement of such provisions. To begin with, it is unclear whether the decision would automatically have been the same had the suspension of special payments not been a prerequisite to the court-approved financing. Second, the court held out the possibility of the regulator and/or the union being able to challenge the continued validity of the suspension at future stages in the CCAA process; whether such future challenges might be successful is, of course, another matter entirely. And finally, the union has appealed the Superior Court decision to the Ontario Court of Appeal, so this decision will not be the last judicial word on the issue.

Gary Nachshen

Cases considered by *Spence J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) -- considered

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

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia (2007), 2007 C.L.L.C. 220-035, 363 N.R. 226, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 65 B.C.L.R. (4th) 201, 283 D.L.R. (4th) 40, 137 C.L.R.B.R. (2d) 166, 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290 (S.C.C.) -- considered

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ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39 (Sask. Q.B.) -- considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, 33 C.B.R. (5th) 50 (Sask. C.A.) -- referred to

Ivaco Inc., Re (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]) -- considered

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) -- referred to

Ivaco Inc., Re (2007), 2007 CarswellOnt 2855, 2007 CarswellOnt 2856, [2006] S.C.C.A. No. 490 (S.C.C.) -- referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) -- considered

Mine Jeffrey inc., Re (2003), 35 C.C.P.B. 71, 2003 CarswellQue 90, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420 (Que. C.A.) -- considered

Richtree Inc., Re (2005), 2005 CarswellOnt 255, 13 C.B.R. (5th) 111, 10 B.L.R. (4th) 334, 7 C.B.R. (5th) 294, 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) -- considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) -- considered

Sulphur Corp. of Canada Ltd., Re (2002), 2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152, 35 C.B.R. (4th) 304 (Alta. Q.B.) -- considered

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) -- considered

United Air Lines Inc., Re (2005), (sub nom. *United Air Lines Inc. (Bankrupt), Re)* 2005 C.E.B. & P.G.R. 8145, 2005 CarswellOnt 1078, 45 C.C.P.B. 151, 9 C.B.R. (5th) 159 (Ont. S.C.J. [Commercial List]) -- considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Generally -- referred to

Builders Lien Act, S.B.C. 1997, c. 45

Generally -- referred to

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

s. 2(d) -- referred to

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

Generally -- referred to

s. 11 -- considered

s. 11(1) -- considered

s. 11(3) -- considered

s. 11(4) -- considered

s. 11(6) -- considered

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

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

s. 11.8(1) [en. 1997, c. 12, s. 124] -- considered

s. 18.6 [en. 1997, c. 12, s. 125] -- referred to

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

Generally -- referred to

s. 69 -- considered

s. 69(1) -- considered

s. 69(2) -- considered

s. 69(12) -- considered

s. 111 -- referred to

s. 116 -- considered

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

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Generally -- referred to

s. 55(2) -- considered

s. 75 -- considered

Regulations considered:

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

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

Generally -- referred to

s. 4(2) -- considered

s. 5(1)(b) -- considered

s. 5(1)(e) -- considered

s. 31 -- considered

MOTIONS by labour unions and Superintendent of Financial Services to amend intial order made with respect to insolvent company under *Companies' Creditors Arrangement Act*.

***Spence J.*:**

1 Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW -- Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

2 On July 19, 2007, Collins & Aikman Automotive Canada Inc. ("Automotive") filed for protection from its creditors pursuant to the CCAA. The Applicant is insolvent. It was clear at the time of the CCAA filing that Automotive would not be able to reorganize and the Court was informed by counsel to Automotive and the Monitor that this proceeding is effectively a liquidation. The Court is advised that the CCAA is being utilized by the Applicant to attempt to maximize the potential recovery for the benefit of all creditors by creating the opportunity to attempt to sell some or all of its remaining operating facilities on a going concern basis.

3 Chrysler LLC (previously known as DaimlerChrysler Company LLC) ("Chrysler") is Automotive's largest remaining customer. In order to provide Automotive with the stability to pursue the sale of its facilities, Automotive, Chrysler, the U.S. Debtors and JPMorgan Chase Bank, N.A. as Agent for the U.S. Debtors' pre-petition secured creditors negotiated a comprehensive funding agreement whereby Chrysler (the "DIP Lender") will fund the costs of this CCAA filing.

4 The relief sought by the moving parties concerns, *inter alia*, the pension plans of Automotive. The Superintendent advises that Automotive maintains seven pension plans which are registered in Ontario,

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The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

> Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

The USW is concerned that, as presently worded, paragraph 4 of the Initial Order is open to an interpretation that permits the Applicant to employ individuals in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation. In particular, paragraph 4 could be taken to authorize the unilateral contracting out of union positions. Accordingly, the USW proposes that the following text should be appended at the end of paragraph 4: ", provided that such further retainers are not in breach of any of its collective agreements."

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:
>
>> (a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements...

8 The Superintendent objects to any provision that would be inconsistent with the Applicant being required to make any and all required employee contributions to its pension plans.

9 The USW objects to the foregoing provision of the Initial Order on the basis that Automotive appears to be interpreting that provision so as to amend the terms of their employment by staying Automotive's obligation to pay compensation accruing due to employees post filing, including, wages, benefits and special payments to the pension plan. Accordingly, the USW proposes that the words "but not required" be struck from paragraph 6.

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

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.....

> b. Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in any plan of arrangement or compromise filed by the Applicants under the CCAA (the "Plan");...
>
> d. Repudiate such of its arrangements or agreement of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; ...

The USW is concerned that these provisions are open to an interpretation that permits Automotive to repudiate its collective agreements with the USW's members. Accordingly, the USW proposes that the following text be added at paragraph 11, following the phrase "(as hereinafter defined)":

> and any and all applicable collective agreements (including, without limitation, all employee benefit, pension and related agreements, compensation policies, and arrangements), and labour laws....

11 The Superintendent seeks an order directing the Applicant to make all required employer contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Initial Order as is necessary to reflect this relief.

12 The CAW seeks an order compelling the Applicant to make the special payments due to the pension plans operated for the benefit of the CAW's members. The special payments that are referred to include the special payments that are provided for under s. 5(1)(b) and section 5(1)(e) of the Regulation under the PBA. These payments are required to be made to liquidate any unfunded liability in the plan by reason of a going concern deficiency and any insolvency deficiency based on actuarial valuation of the plan. The other special payments referred to are those dealt with in s. 31 of the Regulation. These payments are post wind-up special payments owing under s. 75 of the PBA to address a wind-up deficit. Section 31 states that annual special payments are to commence at the "effective date of wind up" and are equal to "the amount required in the year to fund the employer's liabilities under section 75 of the [PBA] in equal payments, payable annually in advance, over not more than five years".

13 As stated in *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.) at paragraph 25, in the context of going concern special payments, special payments "may fluctuate depending upon the investment results of the pension fund and the employer's ongoing contributions, together with estimated demands on the fund by the beneficiaries" and other factors. The true position of the plan cannot, in fact, be known until the crystallization of all benefits when benefits are settled after a wind-up at which 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".

14 Accordingly, special payments are better understood as the payments which (in accordance with the PBA and Regulations and actuarial practice) have to be made to a pension plan now to meet the plan's benefit obligations which do not arise until some point in the future (either on retirement or termination for individual members or when benefits are settled in a plan wind up for the plan as a whole).

15 Likewise, post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date. Again, the actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are used to actually purchase annuities from an insurance company (at then prevailing annuity rates)

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to provide the monthly pension benefit to the member.

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately $345,000 as of June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

17 The factums of the USW and the CAW state that the most recently filed valuations for Automotive's various pension plans identify an aggregate wind-up deficiency of approximately $18.2 million.

Paragraph 26

18 Paragraph 26 provides as follows:

> THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof -- or be deemed to have been or become an employer of any of the Applicant's employees.

The USW is concerned that this provision usurps the exclusive jurisdiction of the Labour Relations Board (the "Board" or the "OLRB") to determine, on a full factual record, whether someone is a successor employer. Accordingly, the USW proposes that the following text be deleted from paragraph 26: "or be deemed to have been or become an employer of any of the Applicant's employees"; and that the following words be added: ", provided that the foregoing is without prejudice to any rights pursuant to the *Labour Relations Act, 1995*, (Ontario)."

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

> THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions on this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

The USW is concerned that this provision provides the Monitor with a blanket immunity on a prospective basis, and that the court has no jurisdiction to provide this immunity and should not provide this immunity even if it did have such authority. Accordingly, the USW proposes that paragraph 29 be deleted and replaced with the following:

> THIS COURT ORDERS that nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any other applicable legislation.

The CRO Order

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21 On September 11, 2007, Automotive returned a motion for an order approving its engagement of Axis Consulting Group Inc. ("Axis") and Allan Rutman ("Rutman") as Chief Restructuring Officer of Automotive (the "CRO Approval Motion")

22 On September 11, 2007, this court made an order approving Automotive and Axis' engagement (the "CRO Order"), subject to a reservation of rights by the USW to challenge paragraph 4 of the CRO Order.

23 Paragraph 4 of the CRO Order is similar to paragraph 29 of the Automotive Initial Order and the USW objects to it for the same reason. That paragraph provides as follows:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

24 The USW proposes that this paragraph be deleted and replaced with the following:

> THIS COURT ORDERS that no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO.

Relevant Statutory and Regulatory Provisions

The Companies Creditors Arrangement Act

25 Section 11(1) of the CCAA provides as follows:

> Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

26 Subsections 11(3) and (4) of the CCAA provide as follows:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
> >
> > (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders --

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

27 Section 11(6) of the CCAA provides as follows:

Burden of Proof on Application --

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

28 Section 11.3 of the CCAA provides as follows:

11.3 No order made under section 11 shall have the effect of

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

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

The Pension Benefits Act

29 Section 55(2) of the PBA provides as follows:

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

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30 The General Regulation to the Act, R.R.O. 1990, Reg. 909, provides in part as follows:

> 4. (2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan...shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,
>
> (a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;
>
> (b) all contributions required to pay the normal cost;
>
> (c) all special payments determined in accordance with section 5; and
>
> (d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.
>
> 5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4 (2) (c) shall be not less than the sum of,
>
> .....
>
> (b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;
>
> .....
>
> (e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

The Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A (the "LRA")

31 Section 69 of the LRA provides in part as follows:

> 69. (1) In this section,
>
> "business" includes a part or parts thereof; ("enterprise")
>
> "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")
>
> Successor employer

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(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

. . . . .

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

32 Section 116 of the LRA provides as follows:

Board's orders not subject to review

116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Jurisdiction of the Court under the Companies' Creditors Arrangement Act

33 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306 (Ont. Gen. Div. [Commercial List]), Blair J. adopted, at paragraph 46, the following passage from the decision of Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[emphasis added]

34 In *Sulphur Corp. of Canada Ltd., Re* (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.), Lovecchio J. considered the jurisdiction

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of the Court to make an order under s. 11 of the CCAA with provisions that conflicted with provisions of the *Builders Lien Act* of British Columbia (the "BLA"), a conflict which arose because of the grant under a CCAA order of a priority to the financing charge of a debtor in possession ("DIP financing") over all other creditors of the applicant company. Lovecchio J. decided that the Court has jurisdiction to grant a change under the CCAA to secure DIP financing which ranks in priority to a statutory lien under the BLA of British Columbia (paragraph 16).

35 After noting that, apart from the circumstances of the case, the lien under the BLA would have priority, Lovecchio J. provided the following analysis under the headings set out below in the following excerpt which addresses the jurisdiction of the Court in helpful detail and is therefore set out fully here:

> **The Paramountcy Argument and the Jurisdiction of the Courts**
>
> ¶ 23 Sections 11(3) and 11(4) of the CCAA read as follows:
>
>> 11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
>>
>> 11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
>
> ¶ 24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?
>
> ¶ 25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Re Hunters Trailer & Marine Ltd.* [See Note 3 below] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the CCAA and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

Note 3: (2002), 94 Alta. L.R. (3d) 389.

> ¶ 26 In discussing the objective of the CCAA, Wachowich C.J.Q.B. stated the following at para. 15:
>
>> The aim of the CCAA is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors...
>
> At para 18:
>
>> I agree with the statement made by Mackenzie J.A. in United Used Auto & Truck Parts Ltd., Re (2000), 16 C.B.R. (4th) 141 (BCCA), at 146 that: ...the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern

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> in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

.....

¶ 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.* [See Note 4 below] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

Note 4: [1999] A.J. No. 185 (C.A.), online: (AJ).

¶ 28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the CCAA. It is within this context that my initial Order and the June 19 Order were based.

¶ 29 Counsel for the Applicants referred to Royal Oak Mines Inc., Re [See Note 5 below] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. ...

Note 5: (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div.).

¶ 30 In *Royal Oak*, Farley J. also relied on Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. [See Note 6 below], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

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Note 6: (1975), [1976] 2 S.C.R. 475..

¶ 31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the *Court of Queen's Bench Act* [See Note 7 below], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the *Mechanics' Liens Act* [See Note 8 below], also a provincial statute.

Note 7: R.S.M. 1970, c. C280.

Note 8: R.S.M. 1970, c. M80

¶ 32 ... In *Smoky*, Hunt J.A. used the words the exercise of discretion -- a discretion she found to have been broad and one provided for in the statute.

¶ 33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CCAA, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

¶ 34 In *Re United Used Auto & Truck Parts Ltd.* [See Note 9 below], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

Note 9: (2000), 16 C.B.R. (4th) 141 (BCCA).

¶ 35 Parliament's way of ensuring that the CCAA would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a dif-

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ferent matter and that will be discussed below.

¶ 36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

¶ 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.

¶ 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* [See Note 10 below] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

Note 10: [1995] B.C.J. No. 1535 (C.A.)

36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), considered the jurisdiction of the Court under s. 11 of the CCAA in connection with an order given under that section removing directors from the board of the applicant company. Paragraphs 31ff of the decision dealt first with the jurisdiction of the Court and then with the exercise of its discretion. The following passages from that decision are relevant with respect to the jurisdiction of the Court:

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

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[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

. . . . .

[35] ...[I]nherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc.* (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the document], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end of the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

37 As to the exercise of the jurisdiction given by s. 11, the Court in *Stelco* said the following at paragraphs 43 and 44:

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> [43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a)--(c) and 11(4)(a)--(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. ...
>
> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

38 The Court in *Stelco* went on to determine that it was not for the Court under s. 11 to usurp the role of the directors and management in conducting the restructuring efforts and found that there was no authority in s. 11 of the CCAA for the Court to interfere with the composition of a board of directors.

In the course of that analysis the Court stated as follows at paragraph 48:

> [48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See Baxter Student *Housing Ltd. v. College Housing Cooperative Ltd.*, *supra*, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps best understood in the context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

40 On this basis, the limitation expressed by the Court in *Stelco* is not to be understood as restricting the jurisdiction of the Court to make orders which carry out that protective function.

41 Similarly, but in a quite different fact situation, Lax J. of this Court, in her decision in *Richtree Inc., Re* (2005), 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) dismissed a motion to exempt the applicant company from certain filing require-

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ments with regulatory authorities: see paragraphs 13 to 18 of the decision. In paragraph 18 of the decision, Lax J. said that the order that was sought had nothing to do with the restructuring process of the applicant company.

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in _Sulphur Corp. of Canada Ltd., Re_, *supra*, at paragraph 37, "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

43 This analysis is developed further with regard to the special payments in the part of the text below that deals with the issue relating to paragraph 6 of the Initial Order.

The Context of the Initial Order and the CRO Order

44 On July 19, 2007, the Court issued the Initial Order authorizing, *inter alia*, Automotive to obtain and borrow under a credit facility (the "DIP Facility") from Chrysler as DIP Lender in order to finance certain expenditures contemplated by the cash flows that are approved by the DIP Lender and filed with the Court.

45 The Initial Order provided that the DIP Facility was to be on the terms and subject to the conditions set forth in the DIP Term Sheet and Commitment Letter between Automotive and the DIP Lender dated as of July 18, 2007 (the "Commitment Letter"), filed with the Court.

46 The Commitment Letter provides:

> The Borrower covenants as follows
>
> The Borrower shall not, without the Lender's prior written consent, make any material disbursement unless it is contemplated in the Initial cash flow, attached as Schedule "A" to this DIP Term Sheet and Commitment Letter (the "Initial Cash Flow") or any rolling cash flow approved by the Lender (collectively "Cash Flow Projections") and, for greater certainty, the Borrower shall not issue any cheques or make any disbursements until such point in time as the Lender has approved the same and confirmed sufficient funding of the same in accordance with the terms hereof[.]

47 The Initial Order also stated that rights of the DIP Lender under the Commitment Letter shall not be impaired in any way in Automotive's CCAA proceedings or by any provincial or federal statutes and that the DIP Lender shall not have any liability to any person whatsoever resulting from the breach by Automotive of any agreement caused by Automotive entering into the Commitment Letter.

48 The Initial Order provided that the DIP Lender was entitled to the benefit of the DIP Lender's Charge on all of the property of Automotive (except certain tax refunds).

49 The Affidavit of John Boken, dated July 19, 2007, sworn on behalf of Automotive and filed with the Court in connection with the application for the Initial Order (the "Boken Affidavit") stated the following at paragraph 46 with respect to the pension plans of Automotive:

> [Automotive] intends to continue to pay current service costs with respect to benefits accruing from the date of filing. The DIP Loan (as defined below), does not provide for the funding of any special payments.

50 In addition, the initial cash flow approved by Chrysler and filed with the Court on the application for the Initial Order

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clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

51 Automotive brought a motion to the Court on July 30, 2007 for, inter alia, an Order confirming the terms of the DIP Facility (the "DIP Approval Motion"). The DIP Approval Motion was made on notice to, among others, the USW and the Superintendent. The Boken Affidavit was again served in connection with the DIP Approval Motion. As noted above, the Boken Affidavit unequivocally indicated that special payments would not be made and were not permitted by the DIP Facility.

52 In addition, the Monitor filed its First Report with the Court at the return of the DIP Approval Motion and specifically noted that Automotive could not make any payments that were not in the cash flow forecast and that special pension payments were not provided for in the forecast. That point was reiterated in the notes to the cash flow forecast.

53 On July 30, 2007, the Court issued an Order confirming the terms of the DIP Facility (the "DIP Approval Order"). The DIP Approval Order provided:

> 3. THIS COURT ORDERS that the DIP Facility provided by DCC to the Applicant in the amount of Cdn.$13.6 million on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and DCC dated as of July 18, 2007, all as set forth in the Initial Order, is hereby confirmed and approved.

54 Based on the First Report of the Monitor and the submissions of all counsel Justice Stinson granted the requested relief and approved the DIP Loan "on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and the DIP Lender dated as of July 18, 2007, all as set forth in the Initial Order". As noted in Justice Stinson's endorsement in respect of the DIP Approval Order, Mr. Bailey on behalf of FSCO and Mr. Starnino on behalf of the USW requested that the Court "record their respective clients' reservation of rights in relation to the pension fund payments and other matters referenced in paragraphs 6(a), 11(b) and (d) of paragraph 26 of the [Initial] Order". Although the CAW did not attend the hearing on July 30, it did receive notice of Automotive's CCAA proceedings on July 23, 2007.

55 No party objected to the approval of the DIP Loan, or the terms and conditions set forth therein. No party appealed Justice Stinson's July 30 order approving the DIP Loan. The appeal period expired on August 20, 2007.

56 The DIP Approval Order was not opposed by the USW or the Superintendent, although they did appear at the DIP Approval Motion.

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

58 On August 23, 2007, the Court issued an Order (the "August 23 Order") approving the Amended DIP Term Sheet and Commitment letter dated August 21, 2007 (the "Amended Commitment Letter"). The Amended Commitment Letter provides that Automotive shall not, without the DIP Lender's prior written consent, make any material disbursement unless it is contemplated in the cash flows approved by the DIP Lender. The Unions and the Superintendent did not oppose the August 23 Order, and they did not seek leave to appeal it.

59 The Boken Affidavit filed in support of the Initial Application indicated that:

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(a) Automotive had no other realistic source of DIP funding to continue operations;

(b) the DIP Loan was the only basis on which funding was available to keep the potential for the preservation of some of the plants as going concerns; and

(c) the DIP Loan was being provided as a component of a complex multi-party agreement that represented a compromise of the rights of Chrysler, Automotive and the U.S. Debtors, which agreement was approved by the US Bankruptcy Court.

60 By Order of Justice Pepall dated September 11, 2007, Axis Consulting Group and Allan Rutman was appointed Chief Restructuring Officer ("CRO") of Automotive (the "CRO Order"). Paragraph 4 of that CRO Order states:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except for any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection therewith. This last limitation on liability will be effective up until and including Sept. 20, 2007 and thereafter as ordered by the judge hearing the motion on Sept. 20, 2007.

61 The last sentence in paragraph 4 of the CRO Order was added by Justice Pepall in response to submissions by counsel that the issue of protections for the CRO were to be further addressed on this motion by the USW.

The Issues

Paragraph 4

62 The USW states its concern that the provision in paragraph 4 that allows the Applicant to retain further Assistants could be interpreted to allow hiring "in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation" (USW Factum, paragraph 43). How in particular that might come about is not explained. It is not suggested that the Applicant has acted or intends to act in such a manner.

63 Paragraph 4 does not provide that such hirings may be made in the manner that is the cause of concern. No basis was submitted for considering that such a result is implicit in paragraph 4.

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making further hirings. It is conceivable in principle that hirings might be made in a way that would raise issues of the kind raised in *Richtree Inc., Re*, *supra*. In such circumstances, having regard to the approach taken by the Court in *Richtree*, the aggrieved parties would apparently be able to seeks appropriate relief from the Court as part of administrative or supervisory jurisdiction in respect of orders made by the Court under the CCAA. That would be an appropriate context in which to address the question of whether there is a conflict between the Collective Agreement and/or the LRA on the one hand and the CCAA and/or the Initial Order on the other. In the present circumstances, it is unnecessary to address the matter and there is no fact situation before the Court to allow it to be addressed properly.

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Paragraph 6

65 The objection taken to the phrase "but not required" in paragraph 6 is that Automotive regards the phrase as staying its obligations to pay various kinds of post-filing employee compensation, including in particular special payments to the pension plan.

66 Under the DIP Approval Order, the Court approved the DIP Facility on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter dated July 18, 2007. As noted, the Commitment Letter precludes Automotive from making distributions not contemplated in approved cash flows and the cash flow filed with the Court stated that special payments under the pension plans would not be made. These features link the DIP Approval Order to the paragraph 6 provision in the Initial Order that the specified kinds of payments are not required to be made. That is to say, the Initial Order and the DIP App4oroval Order are an integrated arrangement. The rationale given for this arrangement in the records is that Automotive will not be in a position to carry on business and will not have available funds without the DIP Facility and the terms on which the DIP Lender is prepared to commit to the DIP Facility are as stated.

67 Automotive states in its factum that it has continued to pay all wages and vacation pay during the course of this CCAA proceeding and intends to continue such payments and that the DIP Loan will, subject to certain conditions, provide advances to facilitate payment of statutory severance obligations.

68 The Initial Cash Flow provides for certain operating disbursements in respect of "Payroll, Payroll Taxes, Benefits, Severance, Other". The associated note states:

> The Forecast [Initial Cash Flow] assumes that payments are made for medical and health benefits and current service pension payments will be made while a plant is operating and then cease on the end of production date. The Forecast does not provide for the payment of any special pension payments as it is assumed these will be stayed in a CCAA filing.

69 The Court has approved the DIP Facility and, subject to this motion, the Initial Order. It is obvious that the DIP Facility and the Initial Order are integrally related. In consequence, if Automotive were to fail to use the funds available under the DIP Facility for the purposes that have been indicated for those funds in these CCAA proceedings, that would be a matter that might properly found a motion to the Court for relief. So the phrase "but not required" in paragraph 6 does not given Automotive a carte blanche to withhold contemplated payments, contrary to a suggestion that was made against the paragraph in the course of the hearing.

70 On the other hand, it is clear that the effect of the terms of the DIP Approval and paragraph 6 of the Initial Order is that Automotive, under the Order, is "not required" to make the special payments under its Pension Plans that would otherwise be required.

71 The requirement for the making of such special payments is a statutory requirement. The special payments are provided for in the pension benefits regime under the PBA and the related regulations, as set out in the relevant provisions excerpted above.

Jurisdiction under the CCAA re the Special Payments

72 The USW and the CAW submitted that the obligation under the pension benefits statutory regime to make special payments is an obligation under their respective collective agreements with Automotive. Those agreements require Automotive to maintain pension plans for members having certain specific features, principally relating to the amount of the pension to be earned and paid for the period of employment served by the employee. It was not shown that any provisions in the collective

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agreements do expressly require Automotive to comply with the statutory regime as to special payments. Rather, the submission seemed to be that because Automotive has an obligation under the Collective Agreement to maintain the pension plan and also has a statutory obligation in respect of pension plans it maintains to make certain special payments, that the contractual obligation impliedly includes the statutory obligations and therefore, any relief from the statutory obligation also constitutes relief from the contractual obligation under the Collective Agreement. Whenever it is argued, as here, that a term should be implied in a contract, the necessary question is why that is so and in this case, no answer is evident from the submissions. The implication was perhaps that it is self-evident but that may be debatable. The pension plan provisions in the collective agreements are addressed to the pension benefits that the plan is required to make available to the members and not to how that is to be done. On this basis, it would seem to be a stretch to say that just because a pension plan is required to conform to the statutory regime, the company sponsoring the plan has impliedly agreed with the bargaining agent to do so. This would suggest that all that the company has agreed to do in the Collective Agreement is to maintain a plan that provides for the benefits contracted for in the collective bargain.

73 However, that analysis may be unduly technical for purposes of the issues on this motion. The commitment of Automotive in its collective agreement to maintain pension plans would given rise to a reasonable expectation that it would keep those plans in good standing in accordance with applicable regulatory requirements designed to ensure that the plans will be able to meet their payment obligations. Moreover, at least one of the pension plans contains a provision which requires the making of all payments required by the applicable statutes. So the better approach is probably to regard the maintenance of the special payments as effectively contemplated by the collective agreements.

74 Even so, this consideration would be relevant to the issue of the jurisdiction of the Court to make the impugned order only if this relationship to the collective agreements gives rise to jurisdictional considerations that are different from those that arise by reasons of the payments being required pursuant to the PBA.

75 As observed by the Supreme Court of Canada in its decision in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia* , 2007 SCC 27 (S.C.C.) at paragraph 86, collective bargaining is a fundamental aspect of Canadian society, which has emerged as the most significant collective activity through which the freedom of association protected by s. 2(d) of the Charter is expressed in the labour context. Recognizing that workers have the right to bargain collectively reaffirms the values of dignity, personal autonomy, equality and democracy.

76 This fundamental process of collective bargaining is entrenched in the laws of Ontario by the LRA, which provides a comprehensive scheme for employment relations. Among other things, that statute directs that:

(a) there shall only be one collective agreement in force between a trade union and an employer;

(b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;

(c) the collective agreement is binding upon the employer and the employees;

(d) the collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or the statute without the consent of the Labour Board on the joint application of the parties;

(e) a provision of a collective agreement may only be revised on the mutual consent of the parties;

(f) no employer and no person acting on behalf of an employer shall interfere with the representation of employees by a trade union; and,

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(g) no employer shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

77 Based on these elements of the LRA, it appears that the employees cannot legally terminate their employment under their collective agreement before "it ceases to operate in accordance with its provisions or the LRA without consent of the O.L.R.B. on the joint application of the parties". The USW submits that therefore, the employees cannot legally terminate their services. However, whether this is so would depend first on whether the making of the Initial Order or its terms would allow the Collective Agreement to be terminated. No submissions were made that assist on this point.

78 Secondly, since the LRA provides that the Collective Agreement could be terminated with the consent of the Board, there is a question whether that consent could be obtained -- a matter that was not canvassed in the submissions.

79 The above considerations relating to the LRA do not suggest that the relationship of the PBA requirements for special payments to the collective agreements should be considered to give those requirements any jurisdictional status for the issues in this case that would go beyond the implications that arise from the fact of those requirements being imposed pursuant to statute.

80 This result is not altered by the Court's recognition that collective bargaining is a fundamental aspect of Canadian society involving the exercise of the freedom of association protected by s. 2(d) of the *Charter*. It was not suggested that the Initial Order constitutes a breach of the *Charter* rights of the employees.

81 The Moving Parties rely upon the decision of Farley J. in *United Air Lines, Inc., Re* (2005), 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) as authority for the proposition that a CCAA debtor must in all circumstances continue to make special payments post-filing. *United Air Lines* involved a motion brought by UAL for an order authorizing it to cease making contributions to its Canadian pension plans. UAL applied for protection from its creditors pursuant to section 18.6 of the CCAA, whereby it sought recognition of a Chapter 11 proceeding in the United States. UAL had filed for bankruptcy protection in the United States in December 2002 and filed under section 18.6 of the CCAA in 2003. The motion was not brought until February 2005.

82 UAL was a large U.S. corporation that was attempting to restructure. It had an international workforce, including a small Canadian workforce. In its motion, it was seeking authority to cease making all contributions to its Canadian pension plans even though it continued to meet its pension funding commitments in all countries other than the United States and Canada. UAL's U.S. employees and retirees had the benefit of the protections provided by the Pension Benefits Guarantee Corporation, while the Canadian employees, as the beneficiaries of a federally regulated scheme, did not. UAL had not presented any evidence of its inability to make the pension payments.

83 After reviewing all of the facts, Farley J. summarized as follows at paragraph 7:

> As discussed above, the relative size of the Canadian problems *vis-a-vis* the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring -- given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

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84 United Air Lines does not appear to stand for the proposition that all pension contributions, including special payments, must in all cases be paid by a CCAA debtor absent an agreement with its unions and FSCO. On the contrary, Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

85 Based on the decision of the Court of appeal for Quebec in *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.), there is a reason to consider that the "not required" clause does not purport to abrogate the pension plan obligations. It authorizes the company not to make payments on account of its obligations during the currency of the Initial Order. Unpaid obligations would constitute debts of the company to be dealt with at the termination of its protection under the CCAA: see *Mine Jeffrey* paragraphs 60 to 62.

86 It was submitted that the text of the *Mine Jeffrey* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Mine Jeffrey* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

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

88 Reference was made to s. 11.3(a) of the CCAA, which provides that no order made under s. 11 is to have the effect of prohibiting a person from requiring payment for services provided after the order is made. The Applicant is paying the wages and the current service obligations under the pension plans of the employees who continue to be employed. The special payments do not relate exclusively to the continuing employees. It is not shown (and does not seem to be submitted) that the amounts that might be required under the special payments arise from or are in connection with the current service obligations to the plan (assuming those obligations are paid in due course). The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

89 Accordingly, this point does not alter the conclusion that the Court has the jurisdiction to approve the "not required" clause, notwithstanding its effect in respect of the special payments.

Exercise of the Statutory Discretion under the CCAA

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90 There is a separate question raised whether it is a proper exercise of the discretion of the court for it to approve the provision in question. That question must be addressed in the context discussed above.

91 The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own. In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately $5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional $12 million. Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.

92 Two other important considerations are evident in the present case. First, for the reasons given above, the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.

93 Secondly, the moving parties each had a full opportunity to object to the approval of the DIP Facility and none of them did so, even though it was clear from the terms of the DIP Facility and the terms of the Initial Order that they are an integrated arrangement. Instead of objecting to the DIP Facility, they have allowed it to be approved and have objected only to the related provisions of the Initial Order. In proceeding this way, it appears they have avoided facing the question whether if they opposed the DIP Approval Order for the reasons they now advance in respect of the special payments, the DIP Lender might have resisted their demands at the first moment, to the detriment of the continuing employment of members, and they now seek to raise the issue now that the DIP lender is in place and has been advancing funds, in circumstances where the only practical consequence could be to raise the question which would have appropriately been raised at the earlier stage.

94 Chrysler submitted that this conduct is a collateral attack on the DIP Approval Order and should not be countenanced by the Court.

95 The Initial Order was approved on July 19, 2007 with a provision in paragraph 3 providing for a further hearing on July 30, 2007 (the "Comeback Date") at which time the Initial Order could be supplemented or otherwise varied. On July 30, 2007 the Court ordered the approval of the DIP Facility. It ordered an extension of the Stay Period to August 24, 2007.

96 The Court did not make any order to supplement or vary the Initial Order in any other respects. Neither did it make any order to the contrary. Nor does it appear from the recitals in the DIP Approval Order that the Court was asked on that motion to deal with the Initial Order in other respects. Stinson J., in his endorsement of July 30, 2007 approving the issuance of the DIP Approval Order, recorded the requests on behalf of the Superintendent and the USW that he record their respective clients' reservation of rights in relation to the pension fund payment and other matters referenced in paragraphs 6(a), 11(b) and (d) and paragraph 26 of the Initial Order. Since this reservation was recorded at the same time as the DIP Approval Order was granted and without any order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

97 It is important that, in the Initial Order at paragraph 34, the DIP Facility was ordered to be on the terms and conditions in the DIP Term Sheet and Commitment Letter dated as of July 18, 2007 which was approved in that paragraph subject to a further hearing on the Comeback Date. Covenant No. 1 in the DIP Term Sheet and Commitment Letter provides that the Borrower shall not without the Lender's prior written consent make any material disbursement unless it is contemplated in the initial cash flow or any subsequent cash flow approved by the Lender.

98 As noted earlier, on the motion to approve the Initial Order the Court had affidavit information from Automotive that the DIP Loan does not provide for the funding of any special payments, along with a copy of the cash flow which states that

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no provision is made for the payment of any special pension payments.

99 So, based on the above analysis, the Court, in the Initial Order, by reason of paragraph 34 (as to which no reservation of a right to object has been made or is now asserted), has ordered that the DIP Loan is not to be applied to special payments except with the consent of the DIP Lender.

100 The Superintendent seeks an order requiring the Applicant to pay the Special Payments. For the reasons given above, such an order would constitute a collateral attack on DIP Approval because the evidence is that the Applicant has no funds available to it other than the DIP Loan. Consequently, the order the Superintendent requests would effectively order the Applicant to use the DIP Loan for a purpose which, pursuant to paragraph 34 of the Initial Order, is not permitted.

101 Chrysler's agreement to act as DIP lender is based on the fact that the Applicant's supply is required to maintain Chrysler's own just-in-time vehicle manufacturing operations. The Superintendent submits that if Chrysler has concluded that it requires the output derived from the labour of the employees, then it is only fair and equitable that Chrysler bears the cost, in terms of remuneration to the employees including special payments to the Pension Plans, of that labour.

102 In the decision in *Ivaco Inc., Re* (2005), 47 C.C.P.B. 62 (Ont. S.C.J. [Commercial List]) at paragraph 4 (affirmed (2006), 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490 (S.C.C.)) at the first instance, Farley J. characterized the nature of special payments, stating that "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".

103 The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period.

104 The Superintendent objects that the approach that has been taken by the Applicant in the present case has been done without the requisite negotiation with the Superintendent and the pension plan stakeholders. In the decision in *United Airlines Inc.*, *supra*, Farley J. cited the example of a case where the company obtained specific relief from the requirement to make special payments although current service costs were made. The Court, however, concluded that such an arrangement "is not a 'given right' of the company" and is to be achieved "on a consensual basis after negotiation" with the pension plan stakeholders.

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been, each side could have assessed its own interests *vis-à-vis* the position of the other and the extent to which it would take the risk of insisting on its position or instead seek a compromise. Instead, what has happened is that the DIP Facility has proceeded without objection and the DIP Lender has changed its position on the basis of the Court orders given to date and now, after it has done so, an effort is made to put it in a position where it has no choice but to increase its funding or risk the loss of the continuing operations. This might yield a negotiation but it would be a lopsided one by reason of the DIP Lender already having provided funding in accordance with the Court orders.

106 The USW contends that its submissions in respect of paragraph 6 of the Initial Order are not in conflict with paragraph 34 because they do not seek an order that the DIP Lender provide the funds that Automotive would require to make the special payments or that Automotive make the payments, but only that it not be ordered that Automotive is not required to make those payments.

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107 Since the material before the Court is to the effect that Automotive had and has no funds and has no expectation of having funds available which could be used to make the special payments, other than the monies available under the DIP Facility, if the Court were now to countenance and make the amendment to paragraph 6 which the moving party seeks, the necessary practical consequence of that amendment would be to allow pressure to be put on the DIP Lender to increase its funding commitment to Automotive and consent to Automotive making the special payments, because Automotive would otherwise be potentially vulnerable to proceedings to force it to meet its payment obligations and there would inevitably be concerns about the consequences that could flow from default on its part. That situation would be contrary to the expectations which both Automotive and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order. It might well be different if the moving party had instead sought an order that the "not required" clause in paragraph 6 should be subject to a proviso that it would not apply to the extent that payment of such amounts could be funded out of monies other than from the DIP Facility. There is no alternative request for such a proviso, perhaps because no one expects it would be of any use.

108 So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

109 Moreover, the failure of the moving parties to reserve in respect of and then dispute paragraph 34 of the Initial Order has the following unsatisfactory effect. If the moving parties had duly disputed paragraph 34 there would have been an opportunity for the Court to consider what would have been the two opposing positions on whether the DIP terms proposed by the DIP Lender should be accepted. If that question had properly been put in issue, then there would also have been an opportunity for each side to consider whether it would seek to press its position or would compromise for the sake of the respective potential benefits to each side. No such opportunity would exists with the request that is now before the Court. So the request should not be granted.

110 For the reasons given above, there is no fair way at the present time to put the parties on a level playing field for negotiation about the special payments. For the reasons mentioned at other points above, it is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible. With these considerations in mind, it is appropriate to take into account that the period of the application of the Initial Order was extended by Court order and will expire on the date set by the last such Order unless further extended. If a motion is made for a further extension of the Initial Order beyond its present expiry date, there would seem to be no basis in the above reasons to object to the legitimacy of interested parties raising an objection to paragraph 6 at that time, provided they are also prepared to object to paragraph 34.

Paragraph 11

111 The objection taken by the USW is that the provisions of s. 11 are open to an interpretation that would permit Automotive to repudiate its collective agreements with the USW's members.

112 Paragraph 11 is stated to be subject to covenants in the Definitive Documents as defined in the Initial Order. (They appear to be certain security documents.) The provision does not state that the right to terminate is subject only to such covenants. No mention is made in paragraph 11 of other obligations to which the Applicant may or may not be subject.

113 The USW seeks to have the rights provided for in clauses (b) and (d) of paragraph 11 made subject to all applicable collective agreements and labour laws. Those rights can only be exercised by agreement with the affected employees or other counterparty or under a plan filed under the CCAA, failing which the matters are to be left to be dealt with in any plan of

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arrangement filed by the Applicant under the CCAA. Nothing in the provision purports to abrogate any applicable collective agreement or labour laws. No reason was advanced why the authorized bargaining agent could not withhold agreement to any proposed exercise of clause (b) or (d) and if Automotive then sought to deal further with the matter pursuant to the CCAA there is no apparent reason why the matter could not be pursued against Automotive in court under the CCAA.

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

115 The USW and the CAW object to the part of paragraph 26 which provides that the monitor, by fulfilling its obligations under the Initial Order, shall not be deemed to have taken control of the business or be deemed to have "been or become an employer of any of the Applicant's employees." [The word "employees" does not appear in the text of the Order in certain of the materials, but it is obviously intended.]

116 The USW objects to the provision on the basis that the determination of whether the monitor is an employer is within the exclusive jurisdiction of the O.L.R.B. by reason of s. 69, s. 111 and s. 116 of the LRA. Section 69(2) of that Act provides that a person to whom an employer sells its business becomes the employer (the "successor employer") for the purposes specified in that section until the Board declares otherwise.

117 The Initial Order does not expressly purport to determine the application of s. 69(2) of the LRA, since it does not refer to that Act. The application of paragraph 26 is stated to be limited to the monitor in its limited role under the Initial Order, which leaves the Applicant in possession and control of the business and, therefore, as the employer . This consideration has been regarded as determinative in finding such a provision to be acceptable: see the *Mine Jeffrey* decision at paragraph [76].

118 The discussion in *Mine Jeffrey ic., Re* about a provision of this kind did not address statutory provisions such as s. 69(2) of the LRA.

119 As worded, it is not apparent that paragraph 26 warrants the concern expressed by the USW. It seems reasonable to assume that if the monitor were to take action of a kind that would suggest that the monitor has started to act *de facto* as the employer, in breach of paragraph 26, a motion might be brought before the Court under the CCAA and/or to the Ontario Labour Relations Board and the matter would then be considered in the context of an actual fact situation rather than in the present abstract and ill-defined circumstances. No order to give effect to the objection of the USW and the CAW in respect of this feature of paragraph 26 is appropriate at the present time.

Paragraph 29

120 The USW objects that the immunity, or limitation of liability, provided to the monitor in the first sentence of paragraph 29 is not within the jurisdiction of the Court under the CCAA, or if it is, the granting of this immunity is not a proper exercise of the discretion of the Court. The impugned provision limits liability to gross negligence and willful misconduct.

121 There was no reservation of rights in the endorsement of Stinson J. of July 30, 2007 with respect to this paragraph.

122 The USW cites no authority that has been decided with respect to the CCAA in support of its contention that the limitation of liability is beyond the jurisdiction of the Court under the CCAA. In view of the stay jurisdiction of s. 11 of the CCAA and taking into account the "on such terms" jurisdiction under that section, it might seem that the better view is that the Court does have the jurisdiction to make such an order and that the only issue is whether the grant of limited liability of

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the kind specified is a proper exercise of the discretion of the Court.

123 The USW submits that other court decisions show that the Court does not have the jurisdiction to grant a limitation of liability to the monitor of the kind set out in paragraph 29.

124 In *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* , [2006] 2 S.C.R. 123 (S.C.C.) ("*T.C.T. Logistics*"), the Supreme Court of Canada held that the "boiler plate" immunization of the receiver, though not uncommon in receivership orders, was invalid in the absence of "explicit statutory language" to authorize such an extreme measure:

> Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.
>
> . . . . .
>
> As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:
>
> > ...explicit statutory language is required to divest persons of rights they otherwise enjoy at law... [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

125 The USW also relies on s. 11.8(1) of the CCAA. Indeed, subsection 11.8(1) explicitly exempts a monitor from liability in respect of claims against the company which arise "before or upon the monitor's appointment":

> Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

126 The decision in *TCT Logistics Inc.* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *TCT Logistics Inc.* decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

127 Section 11.8(1) deals with the situation where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees and it provides a blanket immunity against claims which arose before or upon the monitor's appointment. It is understandable that in the situation addressed in the section that the immunity would be limited to such claims and that it would be a blanket immunity in respect of such claims. The existence of s. 11.8(1) does not given rise to any implication as to what kind of limitation of liability would be reasonable in respect of a monitor with the limited powers given in the present case.

128 The specific wording in paragraph 29 of the Initial Order is consistent with the standard limitation of liability protections granted to monitors under the standard-form model CCAA Initial Order, which was authorized and approved by the Commercial List Users' Committee on September 12, 2006.

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129 That is, of course, not determinative but it suggest that the clause has received serious favourable consideration from members of the bar in a context unrelated to particular party interests.

130 The monitor submitted in its factum a list of twelve recent CCAA proceedings in which orders have been granted with similar provisions to the limitation of liability in this case. This would seem to suggest that in those cases the clause limiting liability was not disputed or, if it was, the Court found the clause to be acceptable.

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

132 The USW advances the submissions made with respect to jurisdiction as regards the monitor based on *TCT Logistics Inc.* against the clause limiting the liability of the CRO.

133 Automotive does not have D&O insurance in place. The protection set out in paragraph 4 of the CRO Order can reasonably be regarded as a fundamental condition of Axis Consulting Group Inc. and Mr. Rutman's agreement to accept and continue as CRO. Automotive would probably be severely restricted in its ability to appoint a capable and experienced Chief Restructuring Officer without the ability to offer a limitation on potential liability.

134 The USW's claim that the Court does not have authority to grant this protection to the CRO is contrary to established practice. These protections are consistent with limitations of liability granted to Chief Restructuring Officers in other CCAA proceedings, and are consistent with the protections granted to Monitors under the standard-form CCAA Initial Order. The same or similar language was used in paragraph 19 of the Order of July 29, 2004 in the Stelco Inc. CCAA proceedings and in paragraph 3 of the Order of November 28, 2003 in the Ivaco Inc. CCAA proceeding, both granted by Farley J.

135 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* , [2007] S.J. No. 154 (Sask. Q.B.) the Saskatchewan Court of Queen's Bench upheld a similar limitation of liability for the Chief Restructuring Officer of Bricore. In dismissing a motion to lift the stay against the Chief Restructuring Officer, Koch J. stated:

> The [CCAA] is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

136 The Saskatchewan Court of Appeal upheld the decision [2007 CarswellSask 324 (Sask. C.A.)].

137 The terms of the limitation of liability given to the CRO are similar to the limitation in the indemnity ordered in paragraph 21 of the Initial Order to be given by the Applicant to the directors and officers of the Applicant. The moving parties have not requested any amendment of that paragraph.

138 It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.

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139 Paragraph 4 of the CRO Order appears satisfactory for the above reasons.

Conclusion

140 For the reasons given above, the motions are dismissed.

141 Counsel may make written submissions as to costs if necessary.

Motions dismissed.

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