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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

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 INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

the Applicants

REPLY FACTUM BOOK OF AUTHORITIES OF THE MOVING PARTY UNITED STEELWORKERS (Motion Returnable August 28, 2009)

August 27, 2009

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** Preliminary Version **

Case Name:

GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.

Industrial Wood & Allied Workers of Canada, Local 700, appellant/respondent on cross-appeal;

v.

GMAC Commercial Credit Corporation - Canada, respondent/appellant on cross-appeal, and T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., the Interim Receiver and Trustee in Bankruptcy of T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc., and TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (a successor to Tri-Line Expressways Ltd. and TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. and 606966 British Columbia Ltd., respondents.

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File No.: 30391.

Supreme Court of Canada

Heard: November 16, 2005;
Judgment: July 27, 2006.

Present: McLachlin C.J. and Major*, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

(167 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Subsequent History:

* Major J. took no part in the judgment.

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Catchwords:

Bankruptcy and insolvency -- Bankruptcy court -- Jurisdiction -- Whether bankruptcy judge lacks jurisdiction to determine whether interim receiver is successor employer under provincial labour relations legislation -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 47, 72(1).

Bankruptcy and Insolvency -- Procedure -- Action against interim receiver -- Bankruptcy legislation precluding proceedings against interim receiver without leave of court -- Union seeking leave to bring "successor employer" application against interim receiver -- Whether Mancini test applicable -- Whether test different when dispute relates to receiver's obligations to debtors' employees represented by union -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 215.

Summary:

The company TCT became insolvent and its largest secured creditor applied for an order appointing an interim receiver. The order appointing KPMG states that the receiver's employment-related actions could not be considered those of a "successor employer", and prohibits proceedings being taken against the interim receiver unless the court grants leave. After TCT was assigned in bankruptcy, KPMG sold most of the assets of the warehousing business to a new company. All unionized employees at the Ontario warehouse were terminated by KPMG, but some of them were later hired by the new company. Except for a change in location, the only major difference between TCT's operations and those of the new company was the absence of the union as representative of TCT's former employees.

The union applied to the Ontario Labour Relations Board seeking, in particular, a declaration that, as a successor employer to TCT or KPMG, the new company was bound by the collective agreement pursuant to s. 69 of the *Labour Relations Act, 1995* ("*LRA*"). After a stay was granted on the basis that s. 215 of the *Bankruptcy and Insolvency Act* ("*BIA*") precludes proceedings against an interim receiver or trustee without leave of the court, the union sought the necessary court approval. The bankruptcy judge amended the paragraph relating to the "successor employer" protection in the order appointing the interim receiver, but denied leave. The Court of Appeal unanimously concluded that only the labour board had jurisdiction to determine who was a successor employer, but divided over the test under s. 215 for granting leave to bring successor employer applications. The majority was of the view that the traditional *Mancini* test represented too low a threshold when the proposed proceedings were successor employer applications, and that other factors should be considered to take account to a greater extent of the impact of such litigation on the bankruptcy process. Accordingly, the majority set aside the bankruptcy judge's refusal to grant leave and remitted the leave application back to him for reconsideration based on the enhanced enumerated factors. The union appealed the Court of Appeal's order denying leave, and the secured creditor cross-appealed on the issue of the bankruptcy judge's jurisdiction.

Held (Deschamps J. dissenting on the appeal): The appeal should be allowed and the cross-appeal dismissed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, **Abella**, Fish and Charron JJ.: The bankruptcy court does not have jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *LRA*. The powers given to the bankruptcy court under s. 47(2) *BIA* are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties

affected by other statutory schemes. Further, s. 72(1) *BIA* declares that unless there is a conflict, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the Act. The right to seek a successor employer declaration pursuant to the *LRA* does not conflict with the bankruptcy court's authority under s. 47(2). If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all rights. Explicit language would be required before such a sweeping power could be attached to s. 47. [para. 4] [paras. 43-51]

The bankruptcy judge erred in not granting leave to the union to bring a successor employer application against the interim receiver. Under the *Mancini* test, the threshold for granting leave under s. 215 *BIA* is not a high one. The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. If the evidence discloses a *prima facie* case, leave should be granted. The focus of the inquiry is not a determination of the merits. The threshold of the *Mancini* test strikes the appropriate balance between the protection of trustees and receivers from frivolous suits, while preserving to the maximum extent possible the rights of creditors and others as against a trustee or receiver. As a result, *Mancini* is consistent with the requirement that there be explicit statutory language before the *BIA* is interpreted so as to deprive persons of rights conferred under provincial law. Where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly. In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers. There is no reason to create a more stringent test to be applied only to claims by employees represented by unions. To impose a higher s. 215 threshold in a case involving a labour board issue is to read into the *BIA* a lower tolerance for the rights of employees represented by unions than for other creditors. Nothing in the Act suggests this dichotomy. Finally, the *Mancini* test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. In this case, since it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed. [para. 7] [paras. 55-61] [paras. 67-72] [para. 80]

*Per***Deschamps** J. (dissenting on the appeal): A judge who must decide whether to grant leave to bring proceedings against a trustee under s. 215 *BIA* must determine the actual scope of the remedy being sought, identify potential conflicts and tailor the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the *BIA*. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law and the judge must therefore deny leave to bring them. [para. 155]

The decision to continue operating the business is central to the trustee's role under the *BIA* and, in principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. The provisions of the *BIA* that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by the *BIA*. The successor employer declaration is not free of pitfalls when it applies to a trustee. The effect of such a declaration is that the trustee becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. Although it is common ground that the *LRA* confers the exclusive power to decide who is a "successor employer" on the OLRB, the *LRA* cannot frustrate the purpose of the *BIA*. It is therefore important to strike a balance between the trustee's duties and immunities under the *BIA* and the employees' rights under the *LRA*.

In the event of conflict, the parties must refer to constitutional principles. Courts that hear disputes relating to the difficulty of applying federal and provincial statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government. Where conflict is unavoidable, however, the federal statute is paramount to the provincial statute. Hence the importance of the screening mechanism of s. 215 *BIA*, which serves the purpose of ensuring that provincial and federal statutes do not conflict with each other. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts. [para. 91] [para. 101] [para. 103] [paras. 112-113] [paras. 117-118] [para. 124] [paras. 128-129]

Although the criteria established in *Mancini* for applying s. 215 are easy to apply to a simple action in damages based on wrongdoing by the trustee, they must, in other cases, be tailored to the specific nature of each application for leave. The judge must assess the nature and scope of the proceeding in light of the evidence. This review does not have the effect of giving special or different treatment to successor employer declarations. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and make provision for conflicts. By ensuring that the conclusions being sought do not impair the application of the *BIA* and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits the federal statute and provincial legislation to be applied simultaneously. A judge who denies leave to bring proceedings merely avoids a conflict by relying on the paramountcy doctrine in a preventive manner. However, the bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits. The judge's first task is to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy. The judge will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 *BIA*, which makes express provision for the application of provincial legislation that is compatible with the federal statute. [para. 136] [paras. 144-154]

In the instant case, the unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the *BIA*. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. [para. 163] [para. 167]

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By Abella J.

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Danny's Cabaret Ltd. v. Horner, [1980] B.C.J. No. 1293 (QL); *Virden Credit Union Ltd. v. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113; *RoyNat Inc. v. Allan* (1988), 61 Alta. L.R. (2d) 165; *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 14 C.B.R. (3d) 233; *Toronto Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6; *Nicholas v. Anderson* (1996), 40 C.B.R. (3d) 32; *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688; *Vanderwoude v. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 195; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

By Deschamps J.

Ex parte James, In re Condon (1874), L.R. 9 Ch. App. 609; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160; *Re L'Heureux (syndic de)*, [1999] R.J.Q. 945; *Caisse populaire de Pontbriand v. Domaine St-Martin Ltée*, [1992] R.D.I. 417; *Azco Mining Inc. v. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392; *Re Reed* (1980), 34 C.B.R. (N.S.) 83; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. May/June 397; *Adam v. Daniel Roy Ltée*, [1983] 1 S.C.R. 683; *Man of Aran* (1974), 6 L.A.C. (2d) 238; *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96; *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126; *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138; *Radio CJYQ-930 Ltd.* (1978), 34 di 617; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, 2005 SCC 52; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92; *Alamo Linen Rentals Ltd. v. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38; *Beatty Limited Partnership (Re)* (1991), 1 O.R. (3d) 636; *Chastan Ventures Ltd., Re* (1993), 23 C.B.R. (3d) 115; *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208; *McKyes, Re*, 1996 CarswellQue 2575; *Nicholas v. Anderson* (1998), 5 C.B.R. (4th) 256; *Gallo v. Beber* (1998), 7 C.B.R. (4th) 170; *Kearney v. Feldman*, [1998] O.J. No. 5109 (QL); *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160; *Mann v. KPMG Inc.* (2000), 197 Sask. R. 181, 2000 SKQB 460; *Vanderwoude v. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127; *Caswan Environmental Services Inc., Re* (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77; *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL); *MacLean v. Morash* (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani v. Devgan*, [2005] O.J. No. 2868 (QL); *105497 Ontario Inc. v. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122; *477470 Al-*

berta Ltd., Re (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430; *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28; *Royal Crest Lifecare Group Inc., Re* (2003), 40 C.B.R. (4th) 146, aff'd (2004), 46 C.B.R. (4th) 126; *Mancini (Bankrupt) v. Falconi* (1989), 76 C.B.R. (N.S.) 90, aff'd (1993), 61 O.A.C. 332; *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] Q.J. No. 264 (QL).

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History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Feldman, MacPherson and Cronk JJ.A.) (2004), 71 O.R. (3d) 54, 238 D.L.R. (4th) 677, 185 O.A.C. 138, 48 C.B.R. (4th) 256, [2004] O.J. No. 1353 (QL), setting aside a decision of Ground J., [2003] O.T.C. 365, 42 C.B.R. (4th) 221, [2003] O.J. No. 1603 (QL). Appeal allowed and cross-appeal dismissed.

Counsel:

Stephen Wahl and Andrew J. Hatnay, for the appellant/respondent on cross-appeal.

Orestes Pasparakis and Susan E. Rothfels, for the respondent/appellant on cross-appeal.

Benjamin Zarnett and Frederick L. Myers, for the respondent KPMG Inc.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ. was delivered by

1 **ABELLA J.**:-- Bankruptcy suspends the economic independence of an enterprise or individual. No longer can operational choices be made by the owner of a business. These become instead the responsibility of the receiver or trustee appointed by the court to salvage as much of the business' financial remains as possible for the benefit of creditors.

2 Those creditors include unionized employees. The issue in this appeal is the extent to which the rights of those employees must yield to the overall objective in a bankruptcy of maximizing the ability of creditors to minimize their losses. In particular, the issue is whether those employees are entitled to the same access to a remedy as other stakeholders who attempt to impugn a receiver's or trustee's conduct.

3 The analysis engages both the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A.

4 Three provisions of the *Bankruptcy and Insolvency Act* are engaged by the circumstances of this case. The first is s. 47, authorizing a judge to appoint and supervise an interim receiver to take possession and control of, or otherwise deal with the debtor's property. The second is s. 215, which immunizes the conduct of receivers and trustees from lawsuits unless prior judicial authorization is obtained. The third is s. 72(1), declaring that unless there is a conflict with the Act, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the federal *Bankruptcy and Insolvency Act*.

5 The relevant provisions of the *Labour Relations Act, 1995* are ss. 69(2), 69(12), 114(1) and 116, the combined effect of which is to give to the Ontario Labour Relations Board exclusive and final authority to determine whether a financial transaction constitutes a sale of a business, thereby triggering the obligation, as a "successor employer", to honour any collective agreements of the acquired business.

6 The issue which animates the interpretive interplay between these provisions is whether to endorse the current judicial approach set out in *Mancini (Bankrupt) v. Falconi* (1993), 61 O.A.C. 332, to determinations under s. 215 of the *Bankruptcy and Insolvency Act* granting or withholding permission to sue a receiver or trustee.

7 For over a decade, the reigning test for mediating between the protection from litigation for those administering a bankrupt estate, and the right to sue them for this very administration, has been the one set out in *Mancini*. In essence, the three principles summarized in *Mancini* preclude frivolous, vexatious or manifestly unmeritorious claims from proceeding. For the reasons that fol-

low, unlike the majority in the Court of Appeal, I see no reason to dethrone it and create a higher test to be applied only to claims by employees represented by unions.

BACKGROUND

8 The bankrupt, T.C.T. Logistics Inc., was one of a number of related companies (collectively "TCT") operating a trucking, freight brokerage and warehousing business of high-tech goods in Canada and the United States. TCT operated its warehouse business from several sites, one of which was in Toronto.

9 Forty-two employees at the Toronto warehouse were represented by the Industrial Wood and Allied Workers of Canada, Local 700 ("Union"). On their behalf, the Union entered into a collective agreement with TCT. The term of the agreement was from May 1, 2000 until April 30, 2004.

10 During the course of the collective agreement, TCT became insolvent. GMAC Commercial Credit Corporation -- Canada ("GMAC"), TCT's largest secured creditor, applied under s. 47 of the *Bankruptcy and Insolvency Act* for an order appointing KPMG Inc. ("KPMG") as interim receiver. The Union was not given notice of this application.

11 The order was made on January 24, 2002. It provides for the termination of all employees "effective immediately", but it also gives KPMG authority to hire or fire any of TCT's employees.

12 The order explicitly states that KPMG's employment-related actions could not be considered those of a "successor employer". The order also prohibits proceedings being taken against the interim receiver unless the court grants leave, and then only if KPMG's solicitor/client costs in such proceedings are secured by court order.

13 The provision at the heart of this litigation is para. 15 of the order, the central provision insulating KPMG from a successor employer designation and more elaborately protecting it from employment obligations arising under either provincial or federal legislation. It states:

> EMPLOYEES
>
> 15. THIS COURT ORDERS that the employment of employees of the Debtors, including employees on maternity leave, disability leave and all other forms of approved absence is hereby terminated effective immediately prior to the appointment of the Receiver. Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the Receiver is not and shall not be deemed or considered to be a successor employer, related employer, sponsor or payer with respect to any of the employees of any of the Debtors or any former employees with the meaning of the *Labour Relations Act* (Ontario), the *Employment Standards Act* (Ontario), the *Pension Benefits Act* (Ontario), *Canada Labour Code, Pension Benefits Standards Act* (Canada) or any other provincial, federal or municipal legislation or common law governing employment or labour standards, (the "Labour Laws") or any other statue [*sic*], regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between any of the Debtors

> and any of their present or former employees, or otherwise. In particular, the Receiver shall not be liable to any of the employees of any of the Debtors for any wages (as "wages" are defined in the *Employment Standards Act* (Ontario)), including severance pay, termination pay and vacation pay, except for such wages as the Receiver may specifically agree to pay. The Receiver shall not be liable for an [*sic*] contribution or other payment to any pension or benefit fund.

14 Paragraph 14 of the order is also relevant:

> THIS COURT ORDERS AND DECLARES that nothing in this Order shall constitute the Receiver as the employer of the employees of any of the Debtors and further orders and declares that the appointment of the Receiver will not constitute a sale of the business of any of the Debtors.

15 Pursuant to a further order, KPMG was directed to file an assignment in bankruptcy on behalf of TCT and the related companies. The assignment was filed on February 25, 2002. KPMG was appointed trustee in bankruptcy.

16 KPMG did not give notice to TCT's employees before it had obtained the January 24 order permitting it to terminate their employment. The Union, upon learning about the order, wrote to TCT and KPMG on February 1, 2002 advising them that, in its view, any collective bargaining rights under the Ontario *Labour Relations Act, 1995* remained "operative and in full force and effect".

17 KPMG met with the employees on February 25, advising them that the business would be continuing in order to evaluate potential sales of the warehousing business. KPMG asked the employees for their loyalty and support "to allow us to maximize the enterprise value for all stakeholders".

18 Subsequently, because of the rapid deterioration of the warehousing business, KPMG sought to sell it as a going concern as quickly as possible. On April 12, KPMG agreed to sell most of the assets of the warehousing business to Spectrum Supply Chain Solutions Inc., a newly formed company.

19 On April 16, KPMG informed the employees about the Spectrum deal and of its intention to seek court approval two days later. An order approving the transaction was obtained on April 18. The closing was scheduled to take place on April 19, 2002.

20 The leasehold interest in the Toronto warehouse was not one of the assets Spectrum purchased. As a result, KPMG decided to wind down its operations and disclaim the lease. It asked Spectrum to manage this process from April 19 until May 23, the date by which KPMG was obliged to vacate the Toronto premises. The resulting management agreement between Spectrum and KPMG entitled Spectrum to any revenues earned during that period in exchange for incurring the costs of winding down the Toronto operation.

21 All unionized employees at the Toronto warehouse were terminated by KPMG on May 9. Some of them were later hired by Spectrum. These hirings were not in accordance with the Union's seniority list.

22 As a result, the Union applied to the Ontario Labour Relations Board on May 13, seeking the following relief under the Ontario *Labour Relations Act, 1995*:

- a declaration that Spectrum was the successor employer to TCT and/or KPMG, and, accordingly, bound by the Union's collective agreement with TCT (under s. 69 of the Act);
- a declaration that TCT and Spectrum were a single employer for labour relations purposes (under s. 1(4) of the Act);
- a declaration of unfair labour practices against TCT and/or KPMG and Spectrum for entering into an agreement discriminating against unionized employees and eliminating the Union in Spectrum's workforce (under s. 96 of the Act); and
- an order certifying the Union as the exclusive bargaining agent for Spectrum's employees.

23 The underlying premise of the Union's application to the Ontario Labour Relations Board was that Spectrum was incorporated for the sole purpose of acquiring TCT's warehousing business and had colluded with KPMG to operate TCT's business at a different location under substantially the same management. Except for the new location, the only major difference between TCT's operations and those of Spectrum was the absence of the Union. The president of Spectrum had been the vice-president, Warehousing and Logistics, of TCT; several of the warehousing managers of TCT became managers of Spectrum; and Spectrum set up the warehousing operations in its new Toronto location with essentially the same customers as TCT.

24 Relying primarily on s. 215 of the *Bankruptcy and Insolvency Act* which prevents proceedings against an interim receiver or trustee in bankruptcy without leave of the court, KPMG obtained a stay of the Union's application from the Ontario Labour Relations Board.

25 The Union accordingly sought the necessary court approval. In its motion to the bankruptcy judge, it asked for the deletion of those portions of the January 24 order which had declared KPMG's conduct incapable of scrutiny under federal or provincial labour and employment legislation. It also sought to strike the security for costs provision.

26 The bankruptcy judge agreed that the costs requirement was unduly onerous and deleted it ((2003), 42 C.B.R. (4th) 221). He declined, however, to delete that part of the order declaring that the interim receiver could not be found to be a "successor employer" under the *Labour Relations Act, 1995*.

27 In the course of his analysis, the bankruptcy judge made a number of observations. Since interim receivership orders are designed to enhance the value of the bankrupt estate as much as possible, and since this objective may sometimes best be realized by continuing the operation of a debtor's business pending a sale, the court was entitled to consider the policy implications of exposing interim receivers or trustees to the risk of being successor employers. Moreover, eliminating the risk of an obligation that might otherwise accrue from continuing a business as a going concern offers employees the possibility of employment with a subsequent purchaser.

28 The bankruptcy judge concluded that it would be unduly burdensome on an interim receiver, and incompatible with its duties, to impose the requirements flowing from a successor employer designation on a receiver engaged in such temporary and limited employment relationships.

29 However, applying the "ancillary" or "necessarily incidental" doctrine crafted by Dickson C.J.C. in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (refined by Iacobucci J. in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, and by LeBel J. in *Kitkatla Band v. British Columbia (Ministry of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31), the bankruptcy judge concluded that the "successor provisions" of the order were only "sufficiently integrated" with the legislative scheme of the *Bankruptcy and Insolvency Act* if the interim receiver was carrying on the bankrupt's business for the purpose of an orderly liquidation of the bankrupt's assets or of effecting a sale of the bankrupt's business as a going concern. He relied on Farley J.'s distinction in *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146 (Ont. S.C.J.), between a receiver (or trustee) acting "*qua* realizer" of the assets and acting "*qua* employer". When acting "*qua* realizer", the receiver was entitled to immunity from successor employer provisions.

30 The bankruptcy judge accordingly amended para. 15 of the order by adding language clarifying that the "successor employer" protection was only valid if KPMG was acting "*qua* realizer" and its conduct was for the purpose of preserving, protecting or liquidating the debtor's assets. The specific language added to the second sentence of para. 15 was:

> for the purpose of preserving, protecting and realizing upon the assets of the Debtors by effecting a sale or sales of the assets or of the business of the Debtors as a going concern or otherwise or for the purpose of effecting an orderly liquidation of the assets of the Debtors.

Since in his view KPMG was carrying on the business as a going concern for these very purposes and acting "*qua* realizer", it was therefore entitled to the protection stipulated in the January 24 order.

31 Turning to s. 215 of the Act, the bankruptcy judge denied the Union leave to bring proceedings against KPMG at the Ontario Labour Relations Board. Since he had concluded that the provisions of the order in relation to KMPG's status as a successor employer were valid as amended, he saw no basis on which leave should be granted to bring a proceeding seeking relief contrary to the terms of the order.

32 On appeal by the Union to the Court of Appeal, there were two issues:

- Did the bankruptcy judge have jurisdiction under s. 47(2) of the *Bankruptcy and Insolvency Act* to make declarations about successorship?
- Did he err in the exercise of his discretion by denying leave under s. 215 of the Act?

33 The Court of Appeal unanimously concluded that only the labour board had jurisdiction to determine who was a successor employer ((2004), 71 O.R. (3d) 54). Section 47(2) of the *Bankruptcy and Insolvency Act* did not confer on the bankruptcy judge the jurisdiction to make declarations on this issue or to otherwise immunize KPMG from such potential declarations by the labour board. Writing for the court on this issue, Feldman J.A. observed that the federal *Bankruptcy and Insolvency Act* itself explicitly states in s. 72(1) that only provincial laws which conflict with the *Bankruptcy and Insolvency Act* can be abrogated. She did not find in s. 47(2) the authority to declare whether actions taken by KPMG make it a successor employer. Accordingly, she saw no conflict between the authority given to the bankruptcy court under s. 47(2) to supervise an interim re-

ceiver, and the successor rights provisions in s. 69(12) of the *Labour Relations Act, 1995*, making a paramountcy analysis unnecessary. As a result, in her view the provincial laws conferring this exclusive jurisdiction on the labour board were unaffected by the *Bankruptcy and Insolvency Act*.

34 Since the bankruptcy judge had no jurisdiction to make *any* determination relating to successor employer status, the distinction he drew in para. 15 of his January 24 order protecting the interim receiver only when it was acting "*qua* realizer" and not "*qua* employer" of the assets was immaterial.

35 On this basis, the Court of Appeal further amended para. 15 deleting the bankruptcy judge's "*qua* realizer" addition, and adding the following two passages:

> unless and until an order is made by the Ontario Labour Relations Board, upon leave of this court under s. 215 of the *Bankruptcy and Insolvency Act*, declaring the interim receiver a successor employer to the debtors, and subject to the specific terms of any such order, the interim receiver is not obliged to make any payment as a successor employer ...
>
> For clarification, the parties have agreed that if any such amounts become payable by the interim receiver as a successor employer, in no event is the interim receiver to be liable for any amount that either became due or accrued prior to the date of its appointment.

36 The court divided, however, on the bankruptcy judge's approach to and resolution of the Union's application for leave to bring labour board proceedings. The disagreement was over the test under s. 215 of the *Bankruptcy and Insolvency Act* for granting leave to bring successor employer applications. Feldman J.A., whose analysis was endorsed in separate concurring reasons by Cronk J.A., was of the view that the traditional *Mancini* test represented too low a threshold when the proposed proceedings were successor employer applications. In her view, an approach was required that took more account of the impact of such litigation on the bankruptcy process.

37 The revised test proposed by Feldman J.A. added factors such as the complexity of the receivership; the availability of suitable purchasers; the potential duration of the receiver's operation of the business pending a sale; any arrangements the receiver has made with the Union to accommodate the employees; the likelihood that a subsequent purchaser will be declared a successor employer bound by the obligations under the collective agreement; and the timeliness of the labour board hearing relative to the receiver's temporary operation and ultimate sale of the business.

38 Feldman J.A. concluded that the bankruptcy judge was obliged not to determine the issue itself, but to determine whether a *prima facie* case of successor employer status had been made out, and, based on the factors she enumerated, to decide whether to grant leave. She accordingly set aside his refusal to grant leave and remitted the leave application back to him for reconsideration based on her enumerated factors.

39 In dissent, MacPherson J.A. saw no basis for erecting a higher threshold for granting leave when the application was for successor employer applications. Other creditors' applications for leave to bring proceedings under s. 215 are usually determined in accordance with the *Mancini* test, the applicability of which had been consistently upheld by the Ontario Court of Appeal, most recently in *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126. In his view, by formu-

lating what he characterized as a "more vague and more elaborate" (para. 111) test uniquely for successor employer leave applications, the majority was inviting a bankruptcy court to do indirectly through s. 215 what it had decided, correctly in his view, could not be done under s. 47(2), namely, insulate the receiver from successor employer determinations.

40 Applying the test in *Mancini*, MacPherson J.A. concluded that the bankruptcy judge had erred in refusing to grant leave to the Union to bring successor employer and unfair labour practice proceedings against KPMG. His remedy, accordingly, would have been to grant leave to the Union to proceed with its application before the labour board.

41 The Union appealed the Court of Appeal's order denying leave to bring its successorship proceedings before the labour board, and disputed the majority's conclusion that the *Mancini* test set too low a bar for granting leave to bring proceedings before the labour board. The Union also sought to have the Court of Appeal's amended version of para. 15 set aside to the extent that it continues to make declarations with respect to successorship rights.

42 GMAC cross-appealed the Court of Appeal's amendments to para. 15, taking issue with the court's unanimous conclusion that a bankruptcy judge lacks jurisdiction to declare whether a receiver is a successor employer under the *Labour Relations Act, 1995*. ANALYSIS

A. *Can a Bankruptcy Court Judge Determine Successor Rights Issues?*

43 The first issue decided by the Court of Appeal, and raised in the cross-appeal, relates to whether the bankruptcy court has jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *Labour Relations Act, 1995*. The unanimous conclusion of the Court of Appeal was that it had no such jurisdiction. I agree.

44 The bankruptcy court's authority to supervise the interim receiver is found in s. 47(2) of the *Bankruptcy and Insolvency Act*, which states:

> **47. ...**
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> *(a)* take possession of all or part of the debtor's property mentioned in the appointment;
> *(b)* exercise such control over that property, and over the debtor's business, as the court considers advisable; and
> *(c)* take such other action as the court considers advisable.

45 These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

46 Any doubt about whether s. 47(2) was intended to dispense such jurisdictional largesse vanishes when it is read in conjunction with s. 72(1) of the *Bankruptcy and Insolvency Act*, which states:

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

47 The effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*. The right in issue here is the right found in s. 69 of the Ontario *Labour Relations Act, 1995* to seek a declaration that a subsequent employer is bound by the employment obligations found in the collective agreements of its predecessor. I agree with Feldman J.A. who concluded:

> ... the first half of [s. 72] clearly states that the *Bankruptcy and Insolvency Act* will not abrogate or supercede any provincial law unless that law is in conflict with the *Bankruptcy and Insolvency Act*. The language of s. 47(2) of the *Bankruptcy and Insolvency Act* does not conflict with the successor employer sections of the *LRA* and therefore does not abrogate or supercede that Act. [para. 30]

48 Section 114(1) of the *Labour Relations Act, 1995* states:

> The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

49 This means the Labour Board has exclusive jurisdiction to make a successor employer determination. It is difficult to see how the right to seek such a declaration conflicts in any way with the bankruptcy court's authority under s. 47(2) to direct and supervise the interim receiver's effective management of the debtor's assets.

50 Trustees, receivers and the specialized courts by which they are supervised, are entitled to a measure of deference consistent with their undisputed expertise in the effective management of a bankruptcy. 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*.

51 If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(*c*). Explicit language would be required before such a sweeping power could be attached to s. 47 in the

face of the preservation of provincially created civil rights in s. 72. As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, [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]

The language of s. 47(2) falls well short of this standard. The bankruptcy court can undoubtedly mandate employment-related conduct by the receiver, but as s. 47(2) of the *Bankruptcy and Insolvency Act* is presently worded, the court cannot, on its own, abrogate the right to seek relief at the labour board.

52 Accordingly, the Court of Appeal was correct to conclude that the bankruptcy judge had no jurisdiction to make a declaration about or immunize the receiver from successor employer liability. To the extent that any provision of the order does so, including the amendments added by the Court of Appeal, they should be set aside.

B. *Is a Unique Test Required Under Section 215 for Leave to Bring Successor Rights Applications?*

53 Having concluded that the bankruptcy judge has no jurisdiction either to make a determination as to the receiver's status as a successor employer, or to immunize it from such a determination by the labour board, the remaining issue is whether to set aside the bankruptcy judge's refusal to permit the Union remedial access to the Ontario Labour Relations Board.

54 The debate between the parties is over the extent of the bankruptcy court's discretion when leave is sought by a union to bring a successor employer application against the receiver or trustee. This shifts the focus to s. 215 of the *Bankruptcy and Insolvency Act*, which states:

> **215.** Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

55 For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact. As L. W. Houlden, G. B. Morawetz and J. Sarra stated in *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 3, at p. 7-118.2:

> The court will not refuse leave unless there is no foundation for the claim or the claim is frivolous and vexatious ...

56 Essentially, unless the claim is without merit, the gate to a litigated determination has usually been opened under s. 215 and its statutory predecessors: see *Randfield v. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075, at p. 1077, *per* Turner L.J. ("... it is not, as I apprehend, according to the course of the Court, to refuse liberty to try a right which is claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim"); *In re Diehl v. Carritt* (1907), 15 O.L.R. 202 (H.C.J.), at p. 204; *Danny's Cabaret Ltd. v. Horner*, [1980] B.C.J. No. 1293 (QL) (C.A.); *Virden Credit Union Ltd. v. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84 (Man. Q.B.), at p.

90; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113 (Ont. C.A.); *RoyNat Inc. v. Allan* (1988), 61 Alta. L.R. (2d) 165 (Q.B.); *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 14 C.B.R. (3d) 233 (B.C.S.C.); *Toronto Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6 (Ont. Ct. (Gen. Div.)), at para. 7; *Nicholas v. Anderson* (1996), 40 C.B.R. (3d) 32 (Ont. Ct. (Gen. Div.)), at paras. 13-15; *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9 (Ont. S.C.J.), at para. 13; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (C.A.), at para. 2; *Vanderwoude v. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 195, at para. 22; *Bennett on Bankruptcy* (8th ed. 2005), at pp. 416-17; *Bennett on Receiverships* (2nd ed. 1999), at p. 223; and Houlden, Morawetz and Sarra, at p. 7-118.2.

57 In the leading case of *Mancini*, the court summarized the accepted principles as being the following:

> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

58 The court in *Mancini* explained that the duty of the trustee is to protect both the creditors and the public interest in the proper administration of the bankrupt estate. The gatekeeping purpose of the leave requirement, therefore, in light of this duty, is to prevent the trustee or receiver "from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action" (para. 17) so that the bankruptcy process is not made unworkable. On the other hand, it ensures that legitimate claims can be advanced.

59 The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. As Blair J. observed in *Nicholas*:

> The question ... is whether, in the circumstances of this case, the facts in support of the proposed claim have been disclosed by sufficient affidavit evidence to ensure the claim's proper factual foundation, having regard to the policy of requiring leave in order to protect a trustee from claims which have no basis in fact. [para. 16]

In other words, the evidence must disclose a *prima facie* case.

60 Although the *Mancini* test calls for an investigation into whether the proposed litigation discloses a cause of action, the focus of that inquiry is not a determination of the merits. This is a particularly important observation in circumstances where exclusive jurisdiction to decide the legal questions raised in the proceedings resides elsewhere. As the court said in *Mancini*, at para. 16 "[o]n a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under [the predecessor of s. 215] must be sufficient to establish that

there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action". See also *Society of Composers, Authors and Music Publishers of Canada*, at para. 2.

61 This threshold strikes the appropriate balance between the protection of trustees and receivers from the distraction and delay inherent in frivolous or merely tactical suits, and the preservation to the maximum extent possible of the rights of creditors and others as against a trustee or receiver. In this way, *Mancini* is consistent with *Crystalline*'s requirement that there be "explicit statutory language" (para. 43) before the *Bankruptcy and Insolvency Act* is interpreted so as to deprive persons of rights conferred under provincial law.

62 The approach proposed by the majority in the Court of Appeal would require that courts consider the effect of the proposed proceeding on, among other considerations, the potential for interference with the maximization of stakeholder value. With respect, the result of the application of this higher threshold would necessarily bar some meritorious cases on the basis that other stakeholders would be better off. To allow bankruptcy courts to use the leave requirement in s. 215 to pick and choose between stakeholders' claims on the basis of a standard which, as MacPherson J.A. noted, at para. 111, is both "more vague and more elaborate" than that set out in *Mancini*, would be a profound departure from the principles in *Crystalline*. The integrity and efficiency of the bankruptcy process are sufficiently advanced by directing bankruptcy courts to deny leave to frivolous and merely tactical suits.

63 A more interventionist approach is premised on the "single control" theory of bankruptcy litigation. In *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92, a case dealing with the enforceability of bankruptcy court orders across Canada, Binnie J. described the goal of a single court controlling all aspects of a bankruptcy, including litigation, as being "the expeditious, efficient and economical clean-up of the aftermath of a financial collapse" (para. 27). The benefits of avoiding multiple proceedings in multiple provinces underlay the decision. But, as Binnie J. also observed, "[s]ingle control is not necessarily inconsistent with transferring particular disputes elsewhere" (para. 76).

64 "Transferring particular disputes elsewhere" is all that is done when leave under s. 215 is granted. Moreover, I note that the "transfer" in the instant case consists only of permitting the tribunal vested with exclusive jurisdiction over the matter to ultimately decide it. It is one thing to avoid permitting provincial enforcement schemes to defeat legitimate bankruptcy orders, as was held in *Sam Lévy*, it is another to use the bankruptcy process to defeat legitimate assertions of provincially granted rights, including labour and employment rights over which the bankruptcy court has no jurisdiction. The *Mancini* test is not, in short, inconsistent with "single control" .

65 Ultimately, the appropriate test under s. 215 of the *Bankruptcy and Insolvency Act* remains a question of statutory interpretation, and the Act itself provides important context for the resolution of that question. I think it is instructive that s. 37 of the *Bankruptcy and Insolvency Act* provides that when the bankrupt, any creditor, or any other person is aggrieved by an act or decision of a trustee or receiver in the administration of the bankrupt estate, he or she may apply to the bankruptcy court. The court may then reverse, modify or confirm the act or decision complained of, making such order as it thinks just. No leave is required under s. 37.

66 Sections 37 and 215 have been called alternative means of proceeding against a trustee or receiver: see *Virden Credit Union*, at pp. 89-90. The difference, of course, is that under s. 215, permission can be sought to seek a remedy elsewhere than in the bankruptcy court, and certain claims

will be beyond the jurisdiction of the bankruptcy court under s. 37. Nevertheless, many actions that may be brought with leave under s. 215 may also be heard in the bankruptcy court on a s. 37 application. What is instructive about s. 37, however, is that it demonstrates that Parliament did not consider it appropriate to immunize court-appointed officers from litigation.

67 On the other hand, where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly, as in s. 14.06(1.2) (trustee immune from certain liabilities arising from continuing the debtor's business or the employment of the debtor's employees); s. 14.06(4) (trustee immune in certain circumstances from environmental liabilities); s. 41(8) (discharge of liability of trustee upon discharge of trustee); ss. 50(9) and 50.4(5) (trustee not liable for detrimental reliance on cash-flow statements if the trustee reviews the statements reasonably and in good faith); s. 80 (trustee not liable for losses resulting from seizure of property); s. 148(3) (no action for a dividend lies against a trustee); s. 171(6) (trustee not liable for reasonable and good faith statement of opinion as to the probable cause of the bankruptcy); s. 197(3) (trustee not liable for costs of a proceeding); s. 251 (no action against a receiver for loss resulting from notice of the receiver's appointment); and s. 252 (no action against a receiver for failure to comply with the Act where the receiver reasonably believed the debtor was not insolvent).

68 In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers.

69 The issue then becomes whether there is some reason why the long-standing principles governing the granting of leave should be different when the dispute relates to the receiver's obligations to the debtors' employees represented by a union.

70 The argument for a higher, more elaborate threshold advanced by the majority in the Court of Appeal is to enhance the receiver's ability to decide how and when to sell the assets, free from the fear of subsequent scrutiny for labour relations violations. The *Mancini* test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. If the argument is that the receiver should be protected from the threat of litigation by the Union because of its inevitable cost, delay and inconvenience, then no creditor should ever be granted leave to sue. No litigation is without delay, cost and inconvenience. But Parliament has nonetheless decided, through s. 215, that the bankruptcy court should, in its discretion, permit litigation against court-appointed officers. It has made no distinction between unions and other creditors in granting this discretionary authority and none should be imputed.

71 To impose a higher s. 215 threshold when it is a labour board issue is to read into the *Bankruptcy and Insolvency Act* a lower tolerance for the rights of employees represented by unions than for other creditors. I see nothing in the Act that suggests this dichotomy.

72 A hierarchical approach to s. 215 which makes it significantly more difficult for a successorship case to obtain leave would unduly give trustees and receivers more protection from being answerable to the court for possible misconduct related to potential breaches of labour relations, and offers unique and enhanced protection for trustees who violate labour rights. It is, moreover, an approach that undermines the protection of rights endorsed by this Court in *Crystalline*. As Borins J.A. of the Ontario Court of Appeal observed in *Royal Crest*:

> While the important role performed by bankruptcy trustees is deserving of protection, the rights of labour unions to pursue legitimate issues on behalf of their members must also be respected. [para. 70]

73 The Court of Appeal unanimously -- and correctly -- reached the conclusion that the bankruptcy court cannot make declarations about, or immunize court-appointed officers from accountability for contraventions of applicable labour relations laws. Yet, the majority's proposed threshold for leave under s. 215 would not only upset the balance in the Act between the gate-keeper function of the bankruptcy court and protected property and civil rights, it would create a real risk that s. 215 would become a *de facto* means by which the bankruptcy court could make such declarations, and, contrary to *Mancini*, effectively decide the issue on its merits. That is what happened at first instance in this case. As MacPherson J.A. observed in his dissent:

> In short, and with respect, my colleague introduces through the side door of s. 215 (a leave provision, not a provision conferring authority on the receiver) precisely what she correctly does not permit the receiver to do through the front door of s. 47(2). [para. 115]

74 Section 215 is not designed to protect the trustee from well-founded litigation. It is designed to afford protection from claims for which there is no factual foundation. All major stakeholders, on a plain reading of the statute, have been given similar access for remedying alleged grievances against the trustee under ss. 37 and 215. Absent a statutory intention to the contrary, this symmetry should continue, whatever the identity of the stakeholder. There is no reason to depart from it when what is sought is relief from the labour board rather than from a bankruptcy judge.

75 That brings us to the proposed action in this case, namely a successor rights application before the labour board. Various provincial statutes provide that the successor employer is bound by the collective agreement and required to recognize the exclusive representation of the employees by their union. The statutes declare that the collective agreement is binding if the business has been sold or otherwise transferred to the successor until the tribunal otherwise declares.

76 In *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, Wilson J., in her dissenting reasons, explained that the purpose of the "successor rights" provisions in labour legislation is "to prevent the loss of union protection by employees whose company's business is sold or transferred" (p. 652). A successor employer is defined in s. 69(2) of the Ontario labour legislation as someone who acquires a business by sale or transfer from an employer and is bound by any existing collective agreements until the Ontario Labour Relations Board rules otherwise.

77 To be found to be a successor employer, as McLachlin J. noted for the majority in *Lester*, a labour board must first determine whether a discernable part of the business was disposed of. This requires an examination of "the nature of the predecessor business, and the nature of the successor business" (p. 676) to determine whether the business of the predecessor is being performed by the successor. Relevant factors include the work covered by the terms of the collective agreement, the type of assets transferred, whether employees are transferred, and whether there is continuity of management or of the work performed. In each case, as McLachlin J. pointed out, the labour relations board must determine "if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor" (p. 677).

78 KPMG and GMAC make a number of arguments directed specifically at the obstacles to the Union's successorship claim, including a constitutional paramountcy argument relating to the effect of a successor employer declaration on the priority scheme in the *Bankruptcy and Insolvency Act*. These are matters for the labour board's consideration. They are not germane to whether leave should be granted. And I appreciate the majority of the Court of Appeal's concern that the possibility of subsequent labour relations scrutiny may have an impact on a receiver's decision about how best to maximize stakeholder value. But again, this goes not to whether leave should be granted, but is a consideration in deciding the merits of the successor rights application. Issues of successorship are within the exclusive jurisdiction of the labour relations board. The labour board has been given exclusive responsibility for deciding these issues because the provincial legislature has confidence in its ability to do so in the public interest, based not only on the expectations of employees, but on those of employers as well.

79 In this case, the Union sought to argue before the Ontario Labour Relations Board that the interim receiver became the employer of the employees after its appointment when it decided to employ them in order to continue operating the warehouse. As an employer, it would be obliged to abide by the collective agreement and applicable labour and employment statutes. The Union alleged it failed to do so by, among other acts, manipulating the sale agreement so that the Union was ousted from the purchaser's workforce.

80 It is by no means clear how the Board will deal with a particular successorship issue, since the outcome will be determined by the facts. But where, as here, it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed.

81 A postscript: No notice of the motion appointing an interim receiver was given to the Union, the exclusive bargaining agent of the employees. I appreciate that what happened in this case is not uncommon: receivers routinely seek an *ex parte* order from the bankruptcy judge with a draft order agreed upon by the debtor corporation and major creditors. Unions, as in this case, receive no notice, thereby losing the opportunity at the earliest possible stage to participate in the formulation of the plan for dealing with the debtor's assets. Notice is no guarantee either of cooperation or resolution, but, arguably, a union shut out of the process early will eventually, like any major creditor, likely seek to protect its interests. As Iacobucci J. observed in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701:

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result ... . [para. 95]

82 While advance negotiations with unions on important decisions may not eliminate a subsequent claim for successor employer liability, they could potentially yield a greater possibility for resolution than ignoring them would. Optimally, advance discussions about the impact on employees if the business is continued will lead to compromise rather than litigation.

83 This would have resulted, in this case, in the immediate integration of a significantly affected party into the development and supervision of the orderly, fair and effective management of the insolvency process. It would not, of course, necessarily have avoided a multiplicity of proceedings. Nor would it have guaranteed the Union's blessing of the proposed methodology for preserv-

ing and realizing the assets. But it would have, at the very least, ensured that its legitimate concerns were factored into the planning at an early enough stage, thereby possibly avoiding later proceedings such as those which arose in this case.

DISPOSITION

84 I would allow the appeal with costs throughout, grant leave to the Union to bring its proceeding before the labour board, and set aside those parts of the order that make a declaration about, or immunize the receiver from, successor employer liability. I would dismiss the cross-appeal with costs.

English version of the reasons delivered by

85 DESCHAMPS J.:-- What factors guide a bankruptcy judge when hearing an application for leave to bring proceedings against a trustee? That is the main issue in this case. To resolve it, however, the Court must consider the limits on the application of provincial law in bankruptcy matters. For the reasons that follow, I am of the view that a judge who decides an application under s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), must do so in a manner consistent with federal and provincial heads of power so as to avoid any constitutional conflicts. I would therefore affirm the Court of Appeal's judgment ((2004), 71 O.R. (3d) 54) remitting the case to the Superior Court of Justice for reconsideration in light of the principles set out below.

86 I have read the reasons of Abella J. She concludes (at para. 78) that it is the Ontario Labour Relations Board ("OLRB") that must decide the constitutional question. In my view, the *BIA* provides for a step that is specifically designed to avoid any constitutional conflicts, and the administrative tribunal should not be allowed to make an unconstitutional declaration. Thus, we disagree as to the forum that should hear and determine the conflict issue. A superior court judge presiding over a bankruptcy case acts as a specialized tribunal. He or she is very familiar with the duties and responsibilities of trustees and serves as the initial jurisdiction to which someone wanting to bring proceedings against a trustee must apply. I propose that the application for leave to bring proceedings pursuant to s. 215 *BIA* be analysed based on the actual effect of the proceedings on the duties and responsibilities of the trustee as set out in the *BIA*. Such an analysis is the only way to guarantee compliance with the principles of constitutional law.

87 In order to assess the areas of conflict between the *BIA* and the provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A ("*LRA*"), concerning successor employers, it will be helpful to begin by briefly reviewing the trustee's role in the context of the 1992 reform of the bankruptcy scheme. I will then discuss the effect of successor employer declarations made by the OLRB before turning to the constitutional principles applicable in the event of conflict. I will conclude by identifying the specific criteria for avoiding conflicts and then making a few comments on the case before the Court.

1. Powers and Responsibilities of the Trustee

1.1 *Role of the Trustee*

88 Viewed generally, the administration of a bankruptcy is straightforward. The trustee receives the assets in one hand, then settles any claims with the other using the proceeds of realization of the assets. In concrete terms, the trustee, in performing these functions, plays an active role in the liquidation of the bankrupt's estate. The trustee's duties and responsibilities are explicitly governed

by the *BIA*. The bankrupt's property vests in the trustee (s. 71). The trustee's powers with respect to the property are set out in the *BIA* (ss. 30 and 31). Subject to the rights of secured creditors and certain other exceptions, the remedies of all the creditors are stayed (s. 69.1). The *BIA* also governs the nature of provable claims and the claims procedure (s. 121). A trustee who carries on the bankrupt's business or continues the employment of the bankrupt's employees is not personally liable for any claims arising before the bankruptcy (s. 14.06(1.2)). However, trustees are authorized to settle such claims out of the assets vested in them (s. 67) by distributing the proceeds of realization of the assets in accordance with the *BIA*, based on the priority of payment for which that Act provides (ss. 136 to 147).

89 The trustee is, first and foremost, an officer of the court:

> ... and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors.
>
> (*Ex parte James, In re Condon* (1874), L.R. 9 Ch. App. 609, at p. 614)

90 The basis for the trustee's long-recognized role as an officer of the court is found in s. 16(4) *BIA*; under the *BIA*, the trustee has the same status as the interim receiver: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (H.L.), at p. 167; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (3d ed. (looseleaf)), vol. 1, at C[s]10 and C[s]44. This status obliges the trustee to act equitably and prudently, to cooperate with the court and, in a more general manner, to contribute to the proper administration of justice (*Re L'Heureux (syndic de)*, [1999] R.J.Q. 945 (C.A.), at p. 949; *Caisse populaire de Pontbriand v. Domaine St-Martin Ltée*, [1992] R.D.I. 417 (C.A.); *Azco Mining Inc. v. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392 (C.A.); *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.); J. Auger and A. Bohémier, "The Status of the Trustee in Bankruptcy" (2002), 37 *R.J.T.* 57, at pp. 99-100).

91 The *BIA* protects trustees while they are acting as officers of the court and exercising the powers conferred upon them by law. A trustee is not personally bound by the bankrupt's obligations. In addition to being protected by the provisions that confer immunity upon them (ss. 14.06(1.2), (2) and (4), 50(9) and 50.4(5)), trustees benefit from the screening of the proceedings provided for in s. 215, which is central to the litigation in the case at bar. The provisions that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by the *BIA*.

92 It is also interesting to note that similar protections exist for monitors appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11.7(4) and 11.8(1), (3) and (5), and liquidators acting pursuant to the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, ss. 35.1 and 76(2).

1.2 *1992 Reform*

93 The rules governing bankruptcy changed considerably with the coming into force of the 1992 reform. The most striking change was the priority given to the reorganization of companies, as opposed to the interruption of business. D. C. A. Tay comments as follows on the significance of the *BIA*'s new thrust:

> The main impact of the BIA is to change the thrust of Canada's bankruptcy legislation from liquidation to rehabilitation. Whereas the old Act dealt primarily with who gets what from the remains of the bankrupt's estate, the BIA tries to provide more ways for an insolvent debtor to stay alive and to restructure and reorganize its affairs.
>
> (*Implications of the New Bankruptcy and Insolvency Act* (1993), article VI,"The *Bankruptcy and Insolvency Act*: Striking a Balance Between the Rights of the Debtor and its Creditors", at p. 2)

94 This change is fundamental, and it unquestionably constitutes one of the main objectives behind the reform. Its effect, in concrete terms, in the case at bar is that the trustee was obliged to facilitate the sale of a going concern rather than to cease operations and liquidate the assets. The objective of continuing operations is a factor that must be incorporated into the constitutional analysis when considering whether a provincial statute frustrates the purpose of the *BIA*.

95 The trustee's duties and responsibilities as a public officer permeate these new functions. The trustee has been transformed from a mere liquidator into an agent of financial restructuring. If trustees are responsible for ensuring that businesses survive and that jobs are preserved, then it follows that they must manage the businesses until purchasers can be found. The trustee's management role is essentially a temporary one. Although the length of the trustee's administration may vary depending on the nature of the business and the economic conditions at the time, the trustee serves essentially as a bridge in maintaining or reorganizing the business before handing it over to a purchaser.

96 It is clear from this crucial role of the trustee that bankruptcy inevitably has consequences for labour relations, which is why it is important to review the interrelationship of the rules of bankruptcy and those of labour relations, more specifically those applicable to the successor employer declaration.

2. Purpose and Effect of the Successor Employer Declaration

2.1 *Purpose of the Declaration*

97 Every Canadian legislature has enacted a provision pursuant to which employees' union protection remains in effect should the business they work for be transferred. The Ontario provision that is relevant to the instant case reads as follows:

> **69.** ...
>
> (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.

98 Without this protection, employees could, although still working at the same jobs, albeit for a new employer, be stripped of the rights their union had negotiated on their behalf.

99 In *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, McLachlin J., as she then was, explained the purpose of the successor employer declaration as follows:

> The basic aim of such provisions is to prevent employees from losing union protection when a business is sold or transferred or when changes are made to the corporate structure of a business. ... [p. 671]

100 Numerous factors are taken into consideration when establishing whether the purchaser of a business has succeeded to the vendor as employer. To determine whether the business has been transferred, the usual practice is to ask whether sufficient significant elements of its assets have been sold to the purchaser and assess the degree of continuity in the business's operations. Each case turns on its own facts, and no single factor is determinative. The decision maker may compare both the human aspects (employee know-how, management system, licences, patents, goodwill) and physical aspects (tangible assets of the business, equipment, land, location) of the assigned business with those of the new one to decide whether there has been a sale. The decision maker also determines whether the constituent parts of the business have been transferred as a whole that is sufficiently coherent for the transfer to be equivalent to the sale of the business as a "functional economic vehicle" and for the survival of the rights arising out of collective bargaining to be justified (*Lester*, at p. 676; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197 (Ont.), at p. 208; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. May/June 397, at pp. 415-16; G. W. Adams, *Canadian Labour Law* (2d ed. (looseleaf)), at pp. 8-4 to 8-23).

2.2 *Effect of the Declaration*

101 The effect of a declaration by the OLRB that an entity has succeeded to another as an employer is that the entity in respect of which the declaration is made becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. The new employer becomes personally liable for the predecessor employer's debts, as well as for any violations of the collective agreement occurring before the sale. For example, the successor may be bound by an arbitration award against the predecessor and be forced to assume responsibility for unfair labour practices. Generally speaking, the successor is personally liable to perform the predecessor's obligations (*Adam v. Daniel Roy Ltée*, [1983] 1 S.C.R. 683, at pp. 694-95; *Man of Aran* (1974), 6 L.A.C. (2d) 238 (Ont.); *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96 (Ont.); *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126 (B.C.); *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138 (Ont. H.C.J.); *Radio CJYQ-930 Ltd.* (1978), 34 di 617; Adams, at pp. 8-38.2 to 8-39; D. D. Carter, G. England, B. Etherington and G. Trudeau, *Labour Law in Canada* (5th ed. 2002), at pp. 280-81).

102 Although protecting employees upon the sale of a business is straightforward in the context of the transfer of obligations to the purchaser, a number of questions are raised when the issue arises in a situation involving a trustee. The difficulties faced by trustees are exacerbated by a lack of uni-

formity both in labour relations legislation across Canada and in the case law relating to that legislation (Adams, at pp. 8-4 *et seq.* and 8-39 *et seq.*).

103 It is common ground that the *LRA* confers the exclusive power to decide who is a "successor employer" on the OLRB. However, since the Ontario statute cannot frustrate the purpose of the *BIA*, it is necessary to determine to what extent a declaration that a trustee is a successor employer is compatible with the *BIA*.

3. Conflicts Between the *BIA* and the *LRA*

104 I have already discussed the effect of a successor employer declaration made under the *LRA*. Section 69(2) *LRA* provides that the purchaser of the business is bound by the obligations of the employer-vendor who signed the collective agreement as if the purchaser had been a party to that agreement. I also mentioned above that a declaration that a trustee is an employer within the meaning of the *LRA* would raise a number of questions. Even a cursory review brings a number of conflicts to light.

105 The most obvious conflict results from claims for unpaid wages. The effect of a successor employer declaration is that the person to whom it applies is liable for the obligations of the employer who signed the collective agreement. The new "employer", the trustee in the case at bar, would be liable for all wages left unpaid by the bankrupt. This obligation is in direct conflict with two provisions of the *BIA*.

106 The first is s. 14.06(1.2), which explicitly provides as follows:

> (1.2) Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.

As the declaration binds the trustee to perform all the obligations of the employer who signed the collective agreement, its effect is to impose on this officer of the court a personal liability from which he or she is explicitly exempted by s. 14.06(1.2).

107 The second incompatible provision is s. 136(1)(*d*), which gives priority to claims of the bankrupt's employees for up to six months' back pay, to a maximum of $2,000 per employee. Any claims in excess of this amount are treated as ordinary claims and paid rateably (s. 141). If the trustee is considered to be an employer, he or she must pay the employees' claims in full, which is inconsistent with the *BIA*. This is another situation in which there is a direct conflict because it is impossible to comply with both the *BIA* and the *LRA*. Although not all bankrupt employers accumulate debts for back pay in excess of the limits provided for in the *BIA*, when one does, the bankruptcy court cannot unconditionally allow a union to request that the trustee be declared the bankrupt's successor.

108 Another conflict may arise in situations similar to the one in *Adam v. Daniel Roy Ltée*. In that case, the new employer was ordered to reinstate and indemnify an employee who had been dismissed by the predecessor employer because of her union activities. Such a decision, if applied to

a trustee, would require the trustee to reinstate an employee even though the bankruptcy had, in principle, terminated his or her employment (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27).

109 Other conflict situations are more subtle. One example is where a trustee must continue operating a business with only a few remaining employees. Procedures relating to lay-offs or to relocation may impose constraints that are incompatible with reorganization for bankruptcy purposes.

110 A final conflict results from the fact that the successor employer declaration is not time-limited. In the case of an actual purchaser, this poses no problems. In principle, the transfer of the business, like the declaration, is final. The same is not true in the case of a trustee, since the trustee, as an officer of the court, is entitled to be discharged once the administration of the assets has been completed (s. 41(2) *BIA*). An unconditional declaration would make the trustee an employer even though the reorganization has been completed and the trustee has been discharged by the bankruptcy court.

111 The above examples clearly illustrate that the successor employer declaration is not free of pitfalls when it applies to a trustee who must discharge his or her duties in accordance with the *BIA*. If in my first example it is clearly impossible to apply the two statutes concurrently, a situation in which the trustee could be held personally liable for debts of the bankrupt connected with the collective agreement would just as obviously frustrate the purpose of the *BIA*. As Feldman J.A. stated in the instant case:

> These bankruptcy considerations are critically important where an interim receiver could be declared a successor employer of the debtor if it carries on the debtor's business in order to sell it as a going concern. Whether to carry on the business is one of the most significant decisions that the receiver must make. That decision affects the entire direction of the bankruptcy and its outcome and, importantly, the ability of the receiver to maximize the value of the bankrupt's estate for the benefit of the affected stakeholders. [para. 53]

112 The decision to continue operating the business is central to the trustee's role under the *BIA*. This role cannot be disregarded. The parties must strike a balance between the trustee's duties and immunities under the *BIA* and the employees' rights under the *LRA*. In the event of conflict, the parties must refer to constitutional principles. A brief review of the relevant doctrines is therefore in order.

4. Double Aspect and Paramountcy Doctrines

113 Conflicts of legislative powers are not tolerated in constitutional law. A number of doctrines have been developed to ensure that federal and provincial powers are respected. Two of them are relevant here: double aspect and paramountcy. The doctrine of paramountcy has been considered in a number of this Court's decisions dealing specifically with bankruptcy, and it would be helpful to summarize those decisions.

4.1 *Double Aspect Doctrine*

114 Provincial legislatures have jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867* (the "Constitution"). The regulation of conditions of employment falls under this head of power. No one is questioning the constitutionality either of the *LRA* as a whole or of s. 69(2). As for Parliament, it has jurisdiction over bankruptcy and insolvency under s. 91(21) of the

Constitution, and neither its jurisdiction nor the provisions granting powers and immunities to trustees are being contested. Thus, each of these statutes, in its own field, is within the jurisdiction of the level of government that enacted it.

115 When effect is given to federal and provincial statutes, they can often be applied concurrently. The Privy Council recognized this possibility at a very early stage:

> ... subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.
>
> (*Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 130)

Thus, when trustees manage businesses while searching for a buyer, they derive their powers from the *BIA*, which is within federal jurisdiction. However, they are not exempt from the application of all provincial legislation. The *BIA* even makes express provision for the application of compatible provincial legislation relating to property and civil rights. Section 72(1) reaffirms the applicability of laws that are not in conflict with the *BIA*:

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

A trustee who operates a business must satisfy a large number of requirements. For example, he or she may neither fail to collect source deductions from employees' pay nor violate minimum labour standards.

116 As a result, because of the division of legislative powers between the levels of government, trustees are subject to a large number of provincial statutes. Courts that hear disputes relating to the difficulty of applying federal and provincial statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government: *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56. Where conflict is unavoidable, another doctrine may apply, namely, paramountcy.

4.2 *Paramountcy Doctrine*

117 The paramountcy of federal laws over provincial laws in the event of conflict is a doctrine that was established long ago: W. R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 *McGill L.J.* 185. Conflicts that will trigger recourse to this doctrine may occur where it is impossible to apply a federal statute and a provincial statute simultaneously (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191), but may also occur where the application of a provincial statute frustrates the legislative purpose of a federal one: *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, and *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 12.

118 While this principle is easily stated, it is not always easy to apply, as can he seen from the numerous cases on this subject.

4.3 Specific Context of Bankruptcy

119 The *BIA* and the *LRA* are not necessarily incompatible. While it is important to acknowledge potential conflicts, it is just as important to ensure that the paramountcy doctrine is not interpreted in a way that makes it impossible to apply provincial provisions in respect of aspects that are compatible with the federal statute. The double aspect doctrine is as important as the doctrine of paramountcy. Courts must ensure that the balance struck by the Constitution is respected and that each level of government can exercise its jurisdiction fully when this can be done without impeding action by the other level.

120 In several important judgments on the subject of bankruptcy, this Court has considered the relationship between bankruptcy legislation and various aspects of provincial property law: *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, and *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, 2005 SCC 52.

121 In *Husky Oil*, Gonthier J., writing for the majority, summarized the principles that can serve as a basis for a "consistent and general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements" (at para. 31). He not only noted that provinces may not *directly* affect priorities under the *Bankruptcy Act*, but also stated propositions that permit the paramountcy doctrine to be applied where provincial legislation *indirectly* conflicts with the *BIA* (paras. 32 (quoting A. J. Roman and M. J. Sweatman, "The Conflict Between Canadian Provincial Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. Bar Rev.* 77, at pp. 78-79) and 39):

> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;
> (3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation;
> (4) the definition of terms such as "secured creditor", if defined under the Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act;
>
> ...
>
> (5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
> (6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the

> *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the *effect* of provincial legislation is to do so. [Emphasis in original.]

122 Although the propositions enunciated in *Husky Oil* relate more specifically to conflicts between provincial statutes and the scheme of distribution established in the *BIA*, they have a scope that extends beyond that specific context, and they demonstrate how the paramountcy doctrine applies in the context of bankruptcy.

123 In principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. However, all the conflicts to which I have alluded will not occur every time the OLRB makes a successor employer declaration. On the one hand, it may be that in the particular circumstances of a case, the trustee's conduct is inconsistent with the role entrusted to him or her by the *BIA*; on the other hand, the OLRB may make a partial declaration if the union does not require the transfer of all the former employer's obligations. The case at bar is a good example of the latter situation. The union argues that it is not seeking a declaration of liability for debts owed before the appointment of the receiver. While this clarification is helpful, it does not avert every potential conflict.

124 The Superior Court plays a decisive role in identifying potential conflicts and must not authorize proceedings that could give rise to a conflict. A judge who denies leave to bring proceedings does not declare the provincial provision to be of no force or effect; he or she merely avoids the conflict by relying on the paramountcy doctrine in a preventive manner, hence the importance of the screening mechanism of s. 215 *BIA*.

5. Section 215 *BIA*

5.1 *Purpose of s. 215 BIA*

125 As I mentioned earlier, Parliament's intent to give trustees flexibility in administering bankruptcies is evident in the immunities provided for in the *BIA*. Section 215 plays an important role in protecting trustees, because a superior court must, in applying it, screen proceedings that could be brought against them. It reads as follows:

> **215.** Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

126 My colleague Abella J. objects to incorporating factors related to the special nature of a declaration that a trustee is an employer into the criteria for applying s. 215 *BIA*. To do so would in her view be to create a special and exceptional test for such a declaration. I myself see it as an incorporation of constitutional principles and an adjustment to new dimensions of the remedies that may be authorized against trustees.

127 Like Feldman and Cronk JJ.A., I am of the opinion that s. 215 acts as a screening mechanism for the purpose of ensuring that provincial and federal statutes do not conflict with each other. The bankruptcy judge acts as a specialized tribunal. Not only is the bankruptcy judge responsible for applying the federal statute, which must take precedence over provincial legislation in the event of conflict, but he or she is also the first person before whom the issue of the potential conflict is

raised and the only one in a position to assess all the interests at stake. It is the bankruptcy judge who must decide all issues relating to the application of the *BIA*.

128 In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14, the Court recognized the central role of the first court or tribunal to which a claimant applies. That case required a decision as to which of two administrative tribunals should decide an issue relating to human rights. In the case at bar, the choice is between the Superior Court and an administrative tribunal, the OLRB, and, what is more, it involves a constitutional question. In light of the Superior Court's expertise in bankruptcy matters and in matters relating to the Constitution, there is all the more reason to choose the Superior Court instead of the administrative tribunal. The bankruptcy court must be permitted to play its central role in full before the tribunal external to the bankruptcy considers the application against the trustee: *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92. In contrast, the OLRB specializes in labour relations, and its mission is to apply the *LRA* and, more specifically in the case at bar, s. 69(2), the purpose of which is to protect employees. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts.

129 I agree with my colleague Abella J. that the trustee is not immunized by the *BIA*. There are two sections that provide for supervision of the trustee's activities: ss. 37 and 215. Section 37 allows any interested person to apply to the bankruptcy court to have it confirm, reverse or modify an act or decision of a trustee that is the subject of a complaint. This remedy is not conditional on first obtaining leave and it sometimes constitutes an alternative remedy to s. 215 *BIA*. What distinguishes s. 37 from s. 215 is that the latter allows proceedings to be brought in a court or tribunal *other* than the bankruptcy court and that it requires leave. Leave is required here because Parliament intended that the bankruptcy court have control over the proceedings. The other court or tribunal is not one that specializes in bankruptcy matters.

130 The vast majority of the decisions based on s. 215 are from cases involving alleged wrongdoing by a trustee: *Alamo Linen Rentals Ltd. v. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38 (Ont. Prov. Ct.); *Beatty Limited Partnership (Re)* (1991), 1 O.R. (3d) 636 (Gen. Div.); *Chastan Ventures Ltd., Re* (1993), 23 C.B.R. (3d) 115 (B.C.S.C.); *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208 (Q.B.); *McKyes, Re*, 1996 CarswellQue 2575 (Sup. Ct.); *Nicholas v. Anderson* (1998), 5 C.B.R. (4th) 256 (Ont. C.A.); *Gallo v. Beber* (1998), 7 C.B.R. (4th) 170 (Ont. C.A.); *Kearney v. Feldman*, [1998] O.J. No. 5109 (QL) (Gen. Div.); *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9 (Ont. S.C.J.); *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160 (Ont. C.A.); *Mann v. KPMG Inc.* (2000), 197 Sask. R. 181, 2000 SKQB 460; *Vanderwoude v. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127 (Ont. C.A.); *Caswan Environmental Services Inc., Re* (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77 (Ont. S.C.J.); *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL) (S.C.J.); *MacLean v. Morash* (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani v. Devgan*, [2005] O.J. No. 2868 (QL) (S.C.J.); *105497 Ontario Inc. v. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122 (Ont. S.C.J.); and *477470 Alberta Ltd., Re* (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430.

131 The courts have hesitated to grant leave to bring proceedings against a trustee for the purpose of obtaining a declaration that the trustee is a successor employer. The instant case exemplifies

this, but the Court of Appeal is not alone in this respect: *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28 (Ont. Ct. (Gen. Div.)).

132 With the evolution of administrative law and the growing number of specialized tribunals, s. 215 is now used for a much wider variety of purposes than before. I agree with what Feldman J.A. said on this subject (para. 54):

> In cases to date dealing with leave under s. 215 of the *BIA*, such as *Mancini*, where the issue has been trustee wrongdoing, factors relating to the bankruptcy court's control over the process have not arisen. In such cases, if leave is granted, the trustee will hire a lawyer to defend it in court, and the trustee will proceed to carry out its duties conducting the receivership or bankruptcy.

133 Applications for leave based on grounds other than negligence or refusal by the trustee to discharge his or her duties are thus a fairly recent occurrence. It is quite clear from the few reported cases that bankruptcy judges are desirous of preserving the trustee's flexibility and that they ensure that proceedings brought before the other court or tribunal do not impede action by the trustee. For instance, in *Royal Crest Lifecare Group Inc., Re* (2003), 40 C.B.R. (4th) 146, the Ontario Superior Court dismissed a union's motion for leave to apply to the OLRB on the following basis (para. 29):

> There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E&Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning *qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.

On an appeal from that judgment ((2004), 46 C.B.R. (4th) 126, at para. 27), the Ontario Court of Appeal explicitly approved the Superior Court's approach, although it noted the constraints inherent in the bankruptcy context (paras. 21, 22, 31 and 32):

> A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose substantial sums of money. Employees of the bankrupt company instantly lose their jobs.
>
> The bankruptcy judge is thrown into the middle of the disaster. The judge will need to make important decisions that will affect the future of the company, creditors and employees. The qualities of a good bankruptcy judge are therefore expertise, sensitivity and speed.
>
> ...
>
> The trustee has many responsibilities - to the estate it is managing, to creditors and to the court. Where, as here, a trustee in bankruptcy seeks to hire

> former employees of the bankrupt company, the trustee also has a responsibility to those employees. The trustee's decision to bring a motion on the first day of its trusteeship seeking a declaration that it not be deemed a successor employer "for any purpose whatsoever" was, in the bankruptcy judge's view, premature. Accordingly, he dismissed the motion. The trustee does not appeal this component of his decision.
>
> Equally, the appellants' cross-motion, understandable perhaps because of the trustee's motion, was also, arguably, misconceived. The first day of a bankruptcy is hardly "business as usual" for anyone, including the employees. The relationship between the trustee and the employees of the bankrupt company cannot be resolved instantly. Care, sensitivity, negotiation and at least some time will be necessary before an appropriate relationship can be set in place. The bankruptcy judge regarded the union's cross-motion as premature as well. Accordingly, he dismissed it, but without foreclosing the possibility that such a motion could succeed once the parties, at a minimum, had explored the establishment of an appropriate employment relationship. Again, I see no basis for interfering with the bankruptcy judge's exercise of discretion in this regard.

134 Thus, the purpose of ss. 37 and 215 is not to immunize the trustee against legitimate proceedings, but to permit the trustee's administration to be supervised without impeding it. Facilitating a form of supervision by the bankruptcy court supports the trustee's role. The *BIA* establishes a scheme under which the effectiveness of the trustee's administration can be taken into account without shielding the trustee from the courts' power of supervision. Section 215 does not indicate what criteria must be met. The flexibility afforded by Parliament permits the bankruptcy court to adapt to new realities, including successor employer declarations.

5.2 *Criteria for Granting Leave*

135 *Mancini (Bankrupt) v. Falconi* (1993), 61 O.A.C. 332, is often cited as the source of the analysis that the judge must conduct. Although the criteria established in that case are easy to apply to a simple claim against a trustee for breach of his or her duties, they must be tailored to the specific nature of each application for leave.

5.2.1 *Mancini* and the Sufficiency of the Evidence

136 There is a need to demystify the analysis developed in *Mancini*. In that case, the moving parties applied for leave to commence an action by way of counterclaim for damages against a trustee. They alleged that the trustee's proceeding constituted an abuse of process and that the trustee had organized a criminal prosecution. The moving parties thus accused the trustee of wrongdoing and asked for an award of damages against the trustee personally. This was not a proceeding likely to impair the application of the *BIA*. The judge did not need to consider the effect the proceeding might have in this regard. However, the Court of Appeal clearly differentiated between two matters a judge must consider on an application for leave under s. 215: the seriousness of the cause of action and the sufficiency of the evidence. On the seriousness of the cause of action, the Court of Appeal in *Mancini* did not set out the applicable analysis, but simply summarized the case law.

137 In my view, the most interesting aspect of that case was the court's discussion about the standard of proof. Moreover, that was the main issue in the case. The Court of Appeal wrote the following:

> In considering whether leave should be granted under s. 186 [now 215] of the *Bankruptcy Act* to commence an action against the trustee, the motions court judge was required to consider the evidence, very generally reviewed above, in the context of the counterclaim sought to be made against the trustee. The issue is not whether the evidence on the s. 186 motion discloses the existence of a cause of action against the trustee, but rather whether the evidence provides the required support for the cause of action sought to be asserted by way of the appellants' counterclaim. Thus, it is necessary to examine the claims that the appellants sought to make against the trustee.
>
> ...
>
> The appellants submit that the motions court judge erred in holding that the evidence filed in support of their motion under s. 186 of the *Bankruptcy Act* must be sufficient to establish a factual foundation for the claim that the appellants propose to make against the trustee. The appellants submit that the test under s. 186 requires no more than some evidence providing a factual foundation for the claim they seek to assert. In my opinion, the motions court judge was correct in reaching the conclusion he did on this issue. On a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under s. 186 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.
>
> The sufficiency of the evidence must be measured in the context of the purpose of s. 186 which, as stated earlier, is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action. As I have previously noted, the evidence on a motion under s. 186 does not have to be sufficient to enable the motions court judge to make a final assessment of the merits of the claim sought to be made, but it must be sufficient to address the issues that I have identified, having in mind the objectives of s. 186. [Emphasis added; paras. 12, 16 and 17.]

138 In saying this, the Court of Appeal was affirming the decision of the trial judge ((1989), 76 C.B.R. (N.S.) 90), who had adopted a clear formulation of what evidence would be sufficient for leave to be granted to bring proceedings against a trustee:

> Because the decision requires an exercise of discretion, the Court must make a more thorough enquiry than when considering whether or not a claim, *as a matter of law*, discloses a cause of action. In considering whether a claim discloses *a cause of action*, the Court presumes the allegations in the claim to be true to determine whether those allegations can provide the basis for a remedy. On a sec-

> tion 186 application, the Court must consider whether there is *evidence* of a factual basis for the proposed claim. The policy of section 186 is to protect the Trustee from claims which have no basis in fact. Ensuring a proper factual foundation for a proposed claim requires that the alleged facts must be disclosed by sufficient affidavit evidence. Facts are not allegations merely to be accepted at face value.

139 If *Mancini* can be considered to have laid down a threshold or test of some sort, I would say that the test relates to the standard of proof required for the bankruptcy court to grant leave to bring proceedings.

140 With regard to the sufficiency of the evidence, *Mancini* thus makes it clear that the judge to whom an application for leave is made under s. 215 cannot accept vague allegations. The allegations must be supported by the evidence. The judge does not have to be convinced that the action is well founded, since he or she is not the trier of fact. However, the judge must ensure that there is sufficient factual evidence, whether in the form of affidavits or exhibits, to support the allegations. To do this, the judge must review the evidence. In ordinary usage, the standard of proof in civil proceedings is often characterized as requiring either proof on the balance of probabilities or *prima facie* evidence. The threshold under s. 215 is not the trial judge's threshold of proof on the balance of probabilities, but *prima facie* evidence.

141 Unlike in *Mancini*, what is in issue in the case at bar is not the question *of fact* of the sufficiency of the evidence, but the question *of law* that is considered at the stage of the review of the seriousness of the cause of action.

5.2.2 Seriousness of the Cause of Action

142 The review of the seriousness of the cause of action must be adapted to the nature of the proceedings the applicant intends to bring. If, as in *Mancini* and the majority of the cases submitted to the courts until quite recently, a monetary award is all that is sought, the proceedings do not prevent the trustee from carrying out his or her duties or impose a burden on the trustee that is incompatible with the *BIA*.

143 However, bankruptcy judges clearly cannot grant leave to bring proceedings that are incompatible with the *BIA*. Thus, a bankruptcy judge could not authorize proceedings aimed at holding a trustee liable where the *BIA* immunizes trustees against the liability in question, as in the case of environmental damage. Since a full defence is available to the trustee pursuant to s. 14.06(2) and (4), such proceedings could not be characterized as serious or, in the words used in *Mancini*, "not frivolous". When a proceeding is not a simple action in damages based on wrongdoing by the trustee, the judge must therefore assess the nature and scope of the proceeding in light of the evidence.

144 Thus, in proceedings in which the OLRB is asked to declare that a trustee has succeeded to the bankrupt as employer, the review by the bankruptcy judge enables the judge to identify the union's actual objective in making this request. This makes it possible for the bankruptcy judge to reconcile the employees' interests with those of anyone else who has interests in the bankruptcy.

145 The judge's review does not have the effect of giving special or different treatment to successor employer declarations. Regardless of the reason the judge gives for granting leave to bring proceedings, the general context of the bankruptcy remains relevant. The judge must play an active role, anticipate the consequences of the proceedings, and limit their scope if need be. Screening the

proceedings in this way is in fact what the trial judge did when he amended the order appointing the receiver so as to limit the protection of the receiver to acts it carried out in the context of the liquidation of the property. This limitation should be qualified if, for example, the issue concerns the rate of wages paid by the trustee. The process engaged in by the trial judge is nevertheless an example of what bankruptcy judges can be required to do on a regular basis in the course of their interactions with the parties. They can tailor the leave they grant to the specific needs of each case. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and must deal with conflicts that could impair the application of the *BIA*.

146 In the case at bar, Feldman J.A. concluded that an operational conflict results each time a bankruptcy judge denies leave to bring proceedings under s. 69(2) *LRA*:

> Because the denial of leave under s. 215 of the *BIA* can be used by the bankruptcy court in appropriate circumstances to preclude the OLRB from exercising its exclusive jurisdiction to declare a person a successor employer, it is in operational conflict with s. 69 of *LRA* when such leave is denied. When that occurs, s. 72(1) of the *BIA* is engaged, with the result that s. 69(12) of the *LRA* is superceded [*sic*] by s. 215 of the *BIA*. [para. 69]

147 I myself would present this idea from a positive perspective. Judges who exercise their jurisdiction under s. 215 are in a position to avoid operational conflicts. By ensuring that the conclusions being sought do not impair the application of the *BIA* and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits the federal statute and provincial legislation to be applied simultaneously.

148 If the union seeks only to maintain wage rates, the proceedings can be limited to that purpose. Similarly, the problem of the period during which the declaration will be effective can be resolved by specifying that the trustee's liability will terminate when the business is transferred to the purchaser.

149 Some cases, such as those involving seniority, may be difficult to evaluate. The issues in such cases will turn on the specific facts of each bankruptcy situation and will sometimes require an assessment of the overall impact of the proceedings.

150 Feldman J.A. mentioned the following factors (para. 58):

> The factors that the bankruptcy court applies on a s. 215 application will relate to both procedural and substantive aspects of the process. Some important factors will include: the timing of the application, the complexity of the receivership and the demands on the receiver as it carries out its obligations, the potential duration of the period that the receiver intends to operate the business before it can be sold (normally as brief as possible), the availability of potential purchasers and their financial strength, and the likelihood that a purchaser will be declared a successor employer and assume all of the obligations under the collective agreement. This latter factor may be particularly important because it will give practical assurance to the union that all of the terms of the collective agreement will be honoured and the employees protected. Another key factor is the practicality of proceeding before the OLRB and the timeliness of a hearing be-

fore that tribunal in the context of the proposed temporary operation of the business and its sale.

These factors could be applied incorrectly. They inevitably overlap with those that will determine the decision on the merits. The bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits.

151 Using the factors proposed by Feldman J.A. entails a second risk. These factors do not expressly mention the employees' rights. The trustee represents the interests of all the creditors, including the employees. The proposed factors must therefore be resituated in the context of the exercise of a remedy that necessarily implies constraints relating to the rights of all the creditors. They cannot serve to allow the trustee to evade the application of a statute that, although it may create a constraint, does not hinder the trustee's work. Judges must therefore bear in mind that they will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. The judge's first task is therefore to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy.

152 Employees' wage rates are one example of a constraint related to the application of the collective agreement that does not ordinarily hinder the trustee's work. Trustees who retain employees' services do not necessarily have the right to reduce their wages. Consequently, if a union seeks a declaration that a trustee is the bankrupt's successor for the sole purpose of maintaining wage rates, and if the interests of the parties cannot be reconciled at the hearing before the bankruptcy court, then leave should normally be granted. An order that a monitor pay recalled employees in accordance with the terms of the collective agreement has been made in the context of the *Companies' Creditors Arrangement Act*. Such an order does not generally lead to conflict with the duties of a liquidator or a trustee: *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] Q.J. No. 264 (QL) (C.A.).

153 Moreover, the review before the bankruptcy judge of the consequences of a declaration is likely to make the parties aware of their respective interests and create an atmosphere conducive to the respect of everyone's rights. When considering the application, the judge must therefore bear in mind all the interests at stake and accept that every constraint does not necessarily hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 *BIA*.

154 To sum up, a judge who must decide whether to grant leave to bring proceedings against a trustee must determine the actual scope of the remedy being sought, identify potential conflicts and tailor the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the *BIA*. Determining the scope of the remedy is part of the review of the cause of action. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law. The judge must tailor the leave. If the conflict cannot be avoided in this way, then leave to bring the proceedings must be denied.

6. Application to the Case at Bar

155 My colleague Abella J. concludes that leave to bring proceedings should be granted. I myself believe that the case should be reconsidered by the Superior Court. The union has not stated its

objective other than to say that the proceedings do not concern debts incurred prior to the trustee's appointment, but this is insufficient to eliminate every potential conflict of jurisdiction, and it is also insufficient for us to substitute our assessment for that of the trial judge.

156 To appreciate the nature of the analysis the bankruptcy judge must carry out, it will be helpful to set out the facts of the case.

157 On January 18, 2002, the respondent GMAC Commercial Credit Corporation - Canada ("GMAC"), the principal creditor of the respondents T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc. ("T.C.T."), was informed that T.C.T. had artificially inflated its accounts receivable and had obtained advances from GMAC that exceeded the value of its security by $21 million. On January 24, 2002, at GMAC's request, the Ontario Superior Court appointed KPMG Inc. as interim receiver of T.C.T.'s property. The appointment order provided that no proceedings could be commenced against KPMG without leave of the Superior Court. The order also stated that KPMG would not be considered to have succeeded to T.C.T. as employer. On February 25, 2002, T.C.T. made an assignment in bankruptcy. KPMG was appointed trustee in bankruptcy. As of the date of the bankruptcy, T.C.T. was operating a brokerage, logistics, trucking and warehousing business in Canada and the United States. The sale of the business was considered urgent (refusal by GMAC to advance additional funds, trucks located across Canada and the U.S., perishable goods still in transit or in warehouses, storage of property at risk, etc.).

158 T.C.T. had 1,357 employees across Canada, including unionized employees represented by 13 different unions. There were 225 employees in the warehousing division, which included warehouses located in Edmonton, Calgary and Toronto. The operation of these warehouses was subject to collective agreements covering 78 employees, including the 42 employees in the Toronto warehouse, who were represented by the appellant, Industrial Wood & Allied Workers of Canada, Local 700 (the "union"). On April 12, 2002, KPMG reached an agreement with Spectrum Supply Chain Solutions Inc. ("Spectrum") under which Spectrum would buy certain specified assets of T.C.T.'s warehouses. The letter of intent initially signed by Spectrum and KPMG provided that Spectrum would operate the warehouses and continue to employ most of the employees. After evaluating the assets, however, Spectrum decided that two of the warehouses were of no interest to it, including the one in Toronto, which was considered to be in disrepair. The final agreement provided that the employees would be terminated and that the lease of the Toronto warehouse would not be assigned to Spectrum. On April 16, 2002, the Toronto employees were informed of the agreement with Spectrum and were also informed that KPMG would be applying to the Superior Court for approval of the agreement on April 18, 2002. The Toronto warehouse was closed on May 23, 2002.

159 On May 13, 2002, the union filed two applications with the OLRB in which KPMG was named as a responding party. The purpose of the first was to have Spectrum declared to be the successor employer to T.C.T. and KPMG under s. 69(2) of the *LRA*. The second was a complaint of unfair labour practices. KPMG contested the applications, submitting that all proceedings were stayed pursuant to the appointment order and the *BIA* and that the union had not applied to the Superior Court for leave, as required by the appointment order and by s. 215 *BIA*. On August 27, 2002, the OLRB ruled in the trustee's favour and stayed the hearing of the applications.

160 The proceedings in the Superior Court concerned only KPMG. The union's application to have Spectrum recognized as the successor to T.C.T. with respect to its obligations as an employer was not in issue.

161 The reasons given by Ground J. of the Superior Court on the merits of the remedy the union sought to exercise were clear ((2003), 42 C.B.R. (4th) 221). Ground J. concluded that the trustee had merely acted as a liquidator and should not, as such, be declared the bankrupt's successor. He did not consider the actual objective being pursued by the union or the possibility of limiting the scope of the proceedings that could be brought before the OLRB. Moreover, it is impossible to determine whether he considered these proceedings to be frivolous or to have no chance of succeeding or whether he felt that the evidence did not *prima facie* support the union's cause of action. In any event, the judge analysed the merits of the case as if he himself was the trier of fact.

162 One observation is necessary here. The unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the *BIA*. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The union and GMAC do not agree on the scope of the successor employer declaration sought by the union in the instant case. The union does not seek to place a time limit on the declaration that the receiver and trustee is a successor employer. Nor has it stated if it is seeking a monetary award or the reinstatement of all unionized employees in the context of the unfair labour practices complaint. Does the dispute concern only wages or does it also relate to transfers and terminations of staff? Other issues could be raised by the parties, who are familiar with all aspects of the case. Not only is it necessary to assess the sufficiency of the evidence, but the uncertainty surrounding the scope of the proceedings and the union's actual objective prevents the Court, incontrovertibly in my view, from granting the union the leave it seeks and that was denied by the judge of the Superior Court.

7. Conclusion

163 The analytical approaches of the Court of Appeal and the Superior Court had the effect of avoiding a constitutional conflict, but they could block legitimate actions. Even in their role as liquidators, trustees are often required to conform to obligations imposed on them by provincial legislation. Not every constraint inherent in a proceeding for a successor employer declaration is liable to hinder the administration of the bankruptcy. The criteria proposed by the Superior Court and the Court of Appeal are therefore too demanding.

164 I propose instead to incorporate into s. 215 a review designed to prevent constitutional conflicts. Under this approach, the paramountcy doctrine would apply only where the third party's proposed action would hinder the application of the *BIA*.

165 Furthermore, I believe that this Court should not supplant the Superior Court to assess the cause of action and the sufficiency of the evidence. In the review required by s. 215, the trier of fact has an active role to play. It is the trier of fact who must conduct the review.

166 The Court of Appeal ordered that the case be remitted to the Superior Court. That was a sound decision. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. The Superior Court did not conduct this more complete review. The Court of Appeal's disposition should accordingly be confirmed.

167 For these reasons, I would dismiss the appeal and the cross-appeal.

Solicitors:

Solicitors for the appellant/respondent on cross-appeal: Koskie Minsky, Toronto.
Solicitors for the respondent/appellant on cross-appeal: Ogilvy Renault, Toronto.
Solicitors for the respondent KPMG Inc.: Goodmans LLP, Toronto.

cp/e/qw/qlplh

Indexed as:

Froese v. Montreal Trust Co. of Canada

Between
Irvin J. Froese, plaintiff (appellant), and
Montreal Trust Company of Canada, defendant (respondent), and
99319 B.C. Ltd. et al., third parties, and
George E. Allan, et al., fourth parties

[1996] B.C.J. No. 1091

137 D.L.R. (4th) 725

[1996] 8 W.W.R. 35

76 B.C.A.C. 81

20 B.C.L.R. (3d) 193

26 B.L.R. (2d) 1

11 C.C.P.B. 233

63 A.C.W.S. (3d) 539

Vancouver Registry No. CA020009

British Columbia Court of Appeal
Vancouver, British Columbia

McEachern C.J.B.C., Gibbs and Williams JJ.A.

Heard: January 11 and 12, 1996.
Judgment: filed May 22, 1996.

(66 pp.)

Trusts -- The trustee -- Duty of prudence -- What constitutes a breach of.

This was an appeal of a dismissal of an action for breach of duty by a trustee. The plaintiff, Froese, was a beneficiary of an employee pension plan. The defendant, Montreal Trust, was the trustee of the plan. Froese retired and he began to receive benefits under the plan. The employer's contributions then became irregular. The employer eventually ceased to contribute and became insolvent. Montreal Trust did not respond to the employer's failure to make regular contributions. It continued to permit regular withdrawals up to the time of the employer's failure. Ultimately there were shortfalls and the plan had to be wound up. Existing regular pensions were actuarially pegged at 70 per cent. However, the actuary recommended that enriched pensions be clawed back further. Froese was an enriched pension holder and his pension was reduced significantly. Froese brought an action against Montreal Trust because the employer was insolvent. The trial judge dismissed the action on the basis that Montreal Trust was not responsible for the employer's failure to make regular contributions. Froese appealed this dismissal on the basis that Montreal Trust failed to ensure that he would receive at least 70 per cent of his pension as per regular pension beneficiaries.

HELD: The appeal was allowed. Montreal Trust made a significant contribution to the losses suffered by Froese. As trustee, Montreal Trust was obliged to respond to the dangers faced by beneficiaries. It should have known that Froese's pension was in jeopardy. Froese was entitled to damages in order to restore him to a 70 per cent or lesser adjusted pension.

Statutes, Regulations and Rules Cited:

Trustee Act, R.S.B.C. 1979, c. 414.

Counsel:

I.G. Nathanson Q.C., and G.B. Gomery, for the appellant.
J.H. Shevchuk and M.E. Currie, for the respondent.

Reasons for judgment were delivered by McEachern C.J.B.C., concurred in by Williams J.A. Dissenting reasons were delivered by Gibbs J.A. (para. 126).

McEACHERN C.J.B.C.:--

INTRODUCTION

1 The plaintiff began his employment with Johnson Terminals Limited, "the Company", in 1949. In 1959, the Company established a pension plan ("the plan") for some of its employees, and thereafter, the Company and those employees began making contributions to the plan.

2 Montreal Trust, "the defendant", accepted the responsibilities of "Trustee" of the plan under a Trust Agreement and Declaration of Trust ("the agreement"). The plan was made a part of the agreement. The Company and the defendant were parties to the agreement, although the participating employees, the cestui trustent or beneficiaries, were not. The agreement originally appointed the defendant as investment manager of the plan but it was replaced in this function in 1985.

3 In 1983, by an amendment ("P-7") to the plan, the Company adopted an early retirement program which provided for "improved" or "enriched" pensions for designated employees, one of whom was the plaintiff.

4 The plaintiff retired on June 30, 1986, and was allocated an improved pension of $2,584 per month.

5 Company contributions for regular, current pensions became irregular after August, 1986, although a substantial payment of $30,000 was made in November, 1987. At the end of 1986, the Company substantially ceased making its required additional contributions for enriched, early retirement pensions.

6 The following tables disclose the irregular nature of Company contributions to these two kinds of pensions.

[Diagrams non-displayable. See paper copy.]

7 The defendant did not react in any way to the Company's failure to make regular contributions; indeed, it continued to make monthly pension payments and to permit other withdrawals from the fund. Ultimately, in 1992, the pension plan had to be wound up; by that time, however, there was a serious shortfall. Existing regular pensions were actuarially pegged at 70%. The actuary recommended, however, that the reduction for enriched pensions be calculated not from the awarded amount, but rather from the amount the pension would have been without enrichment, and that extra payments already made be "clawed back". As a result, the plaintiff's pension was reduced from $2,584.84 to $555.63. Although he dismissed the action, the trial judge held that there were no grounds for these additional deductions, and that the plaintiff should have received 70% of his enriched pension.

8 As the Company is insolvent, the plaintiff brought this action, for breach of duty and in tort, against the defendant only. The plaintiff asserts that he is entitled to recover the full amount of his pension from the defendant, alleging that the defendant is liable because it failed to warn the beneficiaries of the trust that the company was not making regular contributions and that the plan was at risk. The plaintiff's case, supported by a finding of the trial judge, is that up to the end of 1988, there were sufficient funds to provide full pensions under the plan. This finding was:

> I accept as accurate that, had the pension plan been wound up in 1987 or 1988, all the beneficiaries would have continued to receive their full pensions.

9 Instead, because the defendant took no action until 1992, the fund continued to be bled by payments and withdrawals until beneficiaries only received 70% of their pensions after enrichments were "clawed back".

10 In the alternative, the plaintiff claims damages for the defendant's failure to ensure that he would receive at least 70% of his pension.

11 The trial judge dismissed the action, largely on the ground that the defendant's role was a limited one, and that the terms of the agreement and the context in which the defendant acted, made it unnecessary for it to act prudently.

12 There can be little doubt that the terms of the agreement governed the relationship between the Company and the defendant. The plaintiff argues that his pension entitlement and the defendant's obligations to him are governed by the general law, which imposes a duty of care. The legal

issue is: did the defendant owe duties to the beneficiaries additional to those imposed upon it by the agreement?

13 The basic document establishing the pension trust is the agreement which was called "Agreement and Declaration of Trust". The only parties are the Company and the defendant who is described as "the Trustee." However, the whole purpose for which the "Agreement and Declaration of Trust" were entered into, was for the benefit of the employees in their retirement years. The pension plan is attached to, and forms part of, the agreement. The second and fourth preambles of the agreement provide:

> AND WHEREAS under the Plan certain funds will be contributed to the Trustee, which funds as and when received by the Trustee will constitute a trust fund to be held for the benefit of the members in the Plan or their beneficiaries; (emphasis added)
>
> ***
>
> AND WHEREAS the Company desires the Trustee to hold and administer such funds and the Trustee is willing to hold and administer such funds pursuant to the terms of this agreement;

14 Clause 11 of the Plan provides:

> COMPANY CONTRIBUTIONS
>
> 11. The Company shall from time to time but not less frequently than annually, contribute such amounts as are not less than those certified to by an Actuary as necessary to provide for payment of the pension benefits accruing to members during the current year pursuant to the Plan and shall make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued to the credit of members after taking into account the assets of the Fund, the contributions of the members during the year and such other factors as may be deemed relevant.

15 The agreement also included numerous defendant's "exonerations":

> Article FIRST
>
> The Trustee shall not be responsible for the collection of any funds required by the Plan to be paid to the Trustee.
>
> Article SECOND
>
> The Trustee shall be under no liability for any payment made by it pursuant to the direction of the Company certified to be in accordance with the terms of the Plan and shall not be under the duty of making inquiries with respect to whether

> any payment directed by the Company is made in pursuance of the provisions of the Plan.
>
> Article EIGHTH
>
> No person other than the Company may ... bring any action against the Trustee with respect to the said trust and/or its actions as Trustee.
>
> Article NINTH
>
> [T]he Trustee ... shall [not] be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Plan.
>
> Article TWELFTH
>
> This trust and Agreement may be terminated at any time by the Company and upon the termination of the trust and Agreement or upon the dissolution or liquidation of the Company the Trust Fund shall be paid out by the Trustee as directed by the Company ....

16 Originally, the defendant was the investment manager as well as the custodian of the fund. On May 31, 1985, the former function was transferred to another investment manager. After that time and until the winding-up in 1992, the defendant's role as administrator of the plan was to receive payments, follow investment directions, honour directions made by the Company for the payment of pension benefits, keep track of contributions, and generally keep the fund safe.

17 On May 27, 1985, the defendant received a copy of an internal Company memorandum which stated the Special Early Retirement Plan had created a liability which required an additional monthly Company pension contribution of $4,654 over the next 15 years. This obligation arose from generously enriched early pensions. Other similar memoranda were also received by the defendant.

18 The trial judge found that in 1986, and in later years, "the contributions of the Company to the pension fund were sharply reduced." As shown by the tables reproduced above, this "reduction" related not just to the extra contributions already mentioned, but also to the regular required contributions. There were practically no company contributions in 1987 and thereafter. There is evidence that this failure was not discovered by the defendant, but rather that it was brought to the defendant's attention by the actuary in August, 1991. The actuary reported in 1992 that:

> The last actuarial valuation made on an on-going basis was made as at January 1, 1986 and showed an unfunded actuarial liability of about $520,000. Our estimate of the increased actuarial liabilities as a consequence of the early retirement program was about $914,000 as at January 1, 1986 and other sources of gain and loss (notably higher than expected investment earnings) partially offset the costs of the early retirement program.

***

> We understand from discussions with the Company that, although some Company contributions were made following the delivery of our actuarial valuation report to the Company in December, 1986, the Bank of B.C. called its loans to the Company in July of 1987, in the amount of some $16 million and placed a monitor in the Company (until July 1988), and that the Company was during this period permitted to only pay the expenses to operate the Company in order to commence the liquidation of various corporate assets. During this period no Company contributions were made and to the best of our knowledge and understanding, no Company contributions have been made since July, 1987. (emphasis added)

19 The evidence discloses that these statements were substantially correct, although one payment of $2,458 was made in May, 1989.

20 The trial judge made this finding:

> Since Montreal Trust kept track of both company and employee contributions, it must be taken to have been aware of the fluctuations of the company contributions.

21 With respect, one could just as easily read "cessation" for "fluctuations" of Company contributions.

22 I regard the above finding as crucial because it fixes the defendant with knowledge that contributions were not being made. The defendant had knowledge of the money going out of the fund, because it was writing the cheques. In addition, as custodian, the defendant could not have been unaware of a substantial loss suffered by the fund in the late 1987 stock market crash which was internationally notorious.

23 The trial judge made a number of findings favourable to the defendant. These include:

> From 1985, Montreal Trust says, it was on the outside, with no meaningful obligations to the beneficiaries and with no knowledge and no means of knowing whether the plan was healthy. It is true that the functions of Montreal Trust from 1985 were clerical and might as easily have been carried out by a bookkeeper with a cheque writing machine as by a big trust company.
>
> ***
>
> Since Montreal Trust kept track of both company and employee contributions, it must be taken to have been aware of the fluctuations of the company contributions. However, I am unable to find that Montreal Trust was in a position to recognize the implications of them. First, the company was entitled to take contribution holidays under the terms of the plan. That it did so was not necessarily sinister. Secondly, the level of company contributions was not on its face significant. The object of the managers of a pension plan of this kind is to keep it in a position where its assets are sufficient to cover present and future liabilities. This is where the actuary comes in: it sets the level of employer contributions.

> Analyzing the viability of a pension fund is an inexact exercise, involving much prediction. Short-term fluctuations in the value of the fund may be tolerable. Additionally, depending on the attrition rate among potential beneficiaries and changes in the employment structure of the company, fairly large employer contribution fluctuations may not be in themselves meaningful. Montreal Trust did not have a context in which what it knew or ought to have known was recognizably a warning signal: in particular, it was not privy to the periodic reports of the actuary.
>
> ***
>
> ...Montreal Trust was not managing the trust fund. In the discharge of the very limited duties it carried out after 1985, there was no scope for -- and, hence no obligation to undertake -- the exercise of prudent judgment.

24 The judge suggested that the Company was entitled to take "contribution holidays" under the terms of the plan and that therefore there was no reason for suspicion when the Company failed to make regular payments. The real facts are disclosed in the actuaries draft report, Ex. 36, which states:

> The liabilities created by these early retirements were, in fact, met from excess investment earnings during 1986 and the first half of 1987. During 1986, excess investment earnings amounted to $336,000. In the first half of 1987, the gain from excess investment earnings was $787,000. Thus, at June 30, 1987 there was an estimated surplus of $15,000. Part IV of the Plan text was then drafted to provide additional benefits to several executives. The October 1987 stock market crash placed the Plan in a significant deficit and the Plan has never recovered since then.

25 The trial judge found that the defendant did not have the benefit of these valuations, but this lack of information, in my view, works against the defendant because it emphasizes the importance of known missed contributions. As will be seen, however, the defendant did in fact have sufficient information to permit it as a prudent administrator to recognize the serious risk facing the beneficiaries.

26 The trial judge further found that the level of Company contributions may not have been significant because the defendant might assume that the contribution shortfall would be covered by investment income. Even in "buoyant" economic times, however, the Company's failure to make required contributions should have been a danger signal to a prudent trustee. It is difficult to imagine a more significant indication of trouble than the virtual termination of contributions from the principal contributor to the plan. There is no evidence the defendant noticed this failure or that it made any inquiries. Even though "Article First" provides that the Trustee is not responsible for the collection of any funds required to be paid to the Trustee, that should not exonerate the Trustee from making inquiries as to why contributions from the principal contributor to the Plan had not been made.

27 The judge concluded that the defendant did not have a "recognizable warning signal." It is difficult to accept this finding. It is based upon the view that the defendant did not have notice of or access to the entire pension picture. With respect, that is only a part of the analysis. The train engineer who misses a signal is not excused because he did not know there was another train on the track. The defendant in this case missed warning signals for regular contributions from August, 1986, to the end of 1988, and for enriched contributions during most of 1987 and 1988. Even if the defendant did not know the entire pension equation, did its knowledge of the Company's failure to make required contributions give rise to any duty on the part of the defendant to take steps to protect the interests of the beneficiaries? In my view, that question can only be answered in the negative if the judge was right in concluding that the defendant had no obligation to exercise prudence.

28 It must be remembered that throughout this period, the defendant was paying pensions and permitting withdrawals from the fund when contributions required to support them were not being paid. Section 11 of the plan required the defendant, even in its limited role as administrator, to be aware of such matters even if it were oblivious to the losses suffered in the market crash and to the other circumstances of the company. Also, as must be noted, any inquiry into the reason for the missing payments would inevitably have led the defendant to an understanding of the larger circumstances and the dangers facing the beneficiaries. Everything that was later discovered could have been predicted with reasonable accuracy in 1987 or 1988.

29 This inaction on the part of the defendant fully justifies the judge's finding:

> It seems fair to say that, in the critical years from 1986, no one was taking responsibility for the interests of the employees: not the company, not the actuary and, by its own admission, not Montreal Trust.

LEGAL RELATIONSHIPS

30 It will be useful to discuss the legal relationships between the parties. This is a question on which there is very little authority but some helpful commentary.

31 In his seminal work, The Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984), Professor Donovon Waters foresaw some of the problems that arise in this case. First, in a pension context, starting at p. 104, he distinguished between custodial and managing trustees and suggested, in a footnote, that custodial trustees will usually have duties and liabilities expressly restricted to the building and safekeeping of investment instruments. I assume he includes "building" in this passage because he also suggests that even a custodial trustee may not be able to avoid responsibility for bad investments directed by the investment managers.

32 At p. 438, Dr. Waters predicted great expansion in the use of trust concepts in the pension industry and he commented that "some difficult questions are going to face Canadian legislatures." He concluded that "the indenture is of key importance because it determines the role and duties of the trustee." As will be seen, however, contractual responsibilities to the settlor do not tell the whole story.

33 In considering the future of trusts in Canada, at p. 1145, Dr. Waters observed that "broadly stated principles of equity" will apply to many and varied areas of business and commercial life. As if he knew this case would arise, he suggested, "[t]here is likely to be a call for new formulations of the duty of the trustee to account" but he went on to ask whether, with sometimes thousands of beneficiaries:

> [w]hat sort of accounts ought they therefore to receive, and with what frequency? If accounting takes place to the employer only, there is another nice question as to whether there has been any proper accounting at all. Can it be relevant that it is the employer who created the trust, even if it is also the case that the trust is non-contributing on the employer's part? Associated with this issue is the question of information. What information concerning the trust and its investment policies is the trust beneficiary entitled to demand...

34 Several provinces have recently enacted Pensions benefits legislation. In British Columbia, the Pension Benefits Standards Act S.B.C. 1991, c. 15, requires a pension administrator to "act honestly, in good faith and in the best interests of the members and former members and any other persons to whom a fiduciary duty is owed," and to "exercise the care, diligence and skill of a reasonably prudent person under comparable circumstances." The statute specifically states that these requirements exist "in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of a trustee."

35 There have been some useful commentaries about the Ontario legislation with particular reference to some of the issues that must be decided in this case. I refer particularly to The Role and Responsibilities of Trustees in Pension Plan Trusts: Some Problems of Trust Law, by Robert P. Austin in T.G. Youdan, ed., Equity, Fiduciaries and Trusts (Toronto: Carswell, 1989), pp. 111-129; Legal Issues Arising Out Of The Use of Business Trusts in Canada, by Maurice C. Cullity Q.C., also in Youdan, pp. 181-204; and Doing One's Duty: Pension Plan Administrators, Agents and Trustees, by Patricia J. Myhal, (Sept. 1991) 11 Estates and Trusts Journal, pp. 10-43; and Record-Keepers or Whistle-Blowers? A Look at the Role of Pension Fund Custodians, by Dona L. Campbell, (Sept. 1995) 15 Estates and Trusts Journal, pp. 26-47. While I have found these articles most helpful, they must be considered in the light of developing jurisprudence, particularly the recent decision of the Supreme Court of Canada in Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611, which was decided while the present case was at bar. As stated by Cory J., writing for the majority, at p. 639:

> ...If there has been some express or implied declaration of trust, and an alienation of trust property to a trustee for the benefit of the employees, then the pension fund will be a trust fund.
>
> If no trust is created, then the administration and distribution of the pension fund and any surplus will be governed solely by the terms of the plan...

36 Further, at p. 643, Cory J. said:

> When a pension fund is impressed with a trust, that trust is subject to all applicable trust law principles.

37 I pause to note that the partially dissenting passage in the judgment of McLachlin J. in Schmidt, and the earlier passage from Merrill Petroleums Limited et al v. Seaboard Oil Company et al (1957), 22 W.W.R. 529 (Alta. S.C.T.D.), both quoted by the trial judge, related to ascertaining the terms of the trust, and do not touch upon the question I am considering which is whether there are trust obligations additional to the specific terms of the trust indenture or agreement.

38 I agree, as found by the trial judge, that the Supreme Court of Canada has laid to rest any question about the status of the defendant herein as a "true trustee".

39 I therefore conclude that there is what academics call an "overarching" obligation upon a custodial or administrative trustee to pay attention to the interests of the beneficiaries additional to its contractual duties provided in the trust indenture. This obligation is not unlimited: it arises only within the function assigned to or assumed by the trustee.

40 In her article at p. 32, Ms. Campbell confirms that even a custodial trustee owes a duty of care at common law. I am, however, dubious about the authority of some of her examples, including Metropolitan Toronto Pension Plan v. Aetna Life Insurance Co. (1992), 98 D.L.R. (4th) 582 (Ont. Ct. (Gen. Div.)), which was really a case between contracting parties, and Ford v. Laidlaw Carriers Inc. (1993), 50 C.C.E.L. 165 (O.C.J (Gen. Div), reversed in part by an Endorsement, [1994] O.J. No. 2663 (Ont. C.A.), where the court was critical of a custodian's lack of knowledge about the terms of the plan it was administering, and cited with approval dicta from Bartlett v. Barclay's Bank, [1980] 1 All E.R. 139 at 152, which stresses the higher duty expected of a professional trustee. In Ford, the Court of Appeal did not impose liability upon the administrator, because it corrected its errors before any harm was done, and because the real cause of the loss was a deliberate misrepresentation to the employee-beneficiaries on the part of the Company. However, the trial judgment in that case includes many passages of interest in this case. At p. 238, the trial judge said:

> Since a trustee's fundamental duty and obligation is owed to the beneficiaries, a competent trustee would have advised the employees (beneficiaries) that what Laidlaw was proposing to do was not permitted under the plan.

41 Of special interest in Ms. Campbell's article is her section on the responsibility of custodians to monitor contributions. This is specifically required by the Ontario Act. However, at p. 40, Ms. Campbell comments: "it would be difficult to argue that a pension fund trustee bears no responsibility ...[as part of its duty of care] to monitor the adequacy of contributions and to ensure that required contributions are made to the fund in a timely fashion."

42 Ms. Campbell also raises the question of whether a custodian has any responsibility to "react" to events. She notes that this seems to be indicated in the Aetna case, but in a recent English Case, Galmerrow Securities Ltd. v. National Westminster Bank, an unreported decision of Harmon J., Chancery Div., released December 20, 1993, a custodial trustee was not found liable where a fund decreased substantially in value. In that case, as in the case at bar, the trustee did not have investment powers or authority to replace the manager.

43 One cannot read the literature on this question without being struck by an understandable trend towards increased responsibility on the part of trustees, including custodial trustees, to exercise reasonable care for the position of the beneficiaries. In this respect, there are references in the literature to the fact that pension beneficiaries are usually dependent upon decisions or choices made by others such as administrators, investment managers, or actuaries. There is also concern that the party establishing the plan, usually an employer, appoints the other players. There are opportunities for conflicts of interest unless care is taken at all levels to protect the vulnerable and necessarily passive beneficiaries, who literally "trust" others to protect their pensions. Trust companies often speak proudly of the vast amounts they have "under administration". In this case it is necessary to consider what responsibilities should be imposed upon such a function.

44 In a relative vacuum of direct authority, and with the above and other matters in mind, I have considered what conclusions can be reached about the relationships between the parties.

45 First, it is obvious that the relationship between the Company with the investment manager, the actuary and the defendant is largely contractual. The primary duties and responsibilities are defined in the documents which create these relationships. I say "largely contractual" because duties of care arising out of such close relationships will also arise in many circumstances. For example, both the investment manager and the actuary obviously owed a contractual duty to the Company, and possibly also to the beneficiaries although I need not decide that question in this case.

46 Second, in a pension context, as already mentioned, a custodial trustee will almost invariably owe a common law duty of care to the beneficiaries, though such a duty of care is not unlimited. It arises only within the scope of the trustees engagement. A custodian-administrator, for example, would not usually have a duty of care relating to actuarial or investment functions. An administrator, however, has an opportunity, and I think an obligation, to recognize reasonably apparent danger signals. The real question in this case, in my judgment, is whether a prudent, alert pension administrator must respond not just to ordinary administrative matters, but also to unusual events within its cognizance that puts the beneficiaries at risk. Thus, in my view, the responsibility of a custodial or administrative trustee in particular circumstances should include at least the function of a watchdog. With respect, therefore, I question the analogy mentioned by the trial judge between a custodian-administrator and "anyone with a cheque writing machine". I shall discuss that question later.

47 Third, although the question was not argued, I have considered whether the beneficiaries are contractually bound to the defendant as third party beneficiaries to the agreement. As already mentioned, there is both an agreement and a plan. There can be no doubt the beneficiaries are participants in the plan and bound by it in the sense that while they have a right to whatever it provides for them, they have no right to anything more out of the fund than what the plan provides.

48 Under conventional contract law, as non-parties, the beneficiaries are strangers to the agreement. Recently, however, the law has recognized third party rights in some special circumstances. London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299 is an example. With respect, and without the benefit of counsel's assistance, I can find no juridical reason to impose the burdens of the defendant's exonerations upon the passive members of the plan. It will be remembered that the principal reason the employees in London Drugs were protected by the limitation of liability in the employers contract with the plaintiff customer was because the employees were performing the actual obligations of their employer under the contract. One of the common law duties owed by the defendant in the case at bar was to protect the interests of the non-party beneficiaries. It would make little sense to superimpose a general duty of care toward beneficiaries upon the defendant and then to apply contractual exonerations to that duty of care. There are good juridical reasons to maintain the doctrine of contractual privity between the defendant and the beneficiaries in the circumstances of this case. Furthermore, applying the test adopted by the majority at p. 448 of London Drugs, there is nothing in the language of the agreement that suggests its terms should be imposed upon the beneficiaries as if they were parties.

49 Accordingly, I conclude that the beneficiaries should not be treated as parties to the agreement. Counsel did not suggest otherwise.

50 Lastly, returning to what I stated a moment ago, the foregoing does not decide this case against the defendant because its responsibility can only be assessed in a factual context, and legal

truth can usually be found only in the details. I turn, therefore, to consider the conduct of the defendant in the circumstances disclosed by the evidence.

THE DUTY TO WARN

51 As already mentioned, the trial judge found that the defendant, because it was not managing the trust fund, had "no scope" for -- and, hence no obligation to undertake -- the exercise of prudent judgment.

52 This case, of course, can be approached from at least two perspectives. First, one can take the approach taken by the trial judge, which was that the agreement alone defined the duties and obligations of the defendant and that, accordingly, the defendant was under no duty to be prudent; if it failed in that connection, it was protected against liability by the many exoneration clauses within the Agreement. The defendant alleges in its factum, and the judge found, that even if it appreciated the significance of the uneven (or absent contributions), it had no express duty, and therefore no obligation, to volunteer information to beneficiaries.

53 If this is the correct approach then I would agree that the plaintiff must fail on this branch of his appeal.

54 The trial judge did not consider the broader approach, that although the plaintiff is not a party to the agreement, duties in trust and tort may arise because of the close financial relationship between the beneficiaries and the defendant. What stands out in this case is that the defendant did not seem to consider or appreciate until 1991 that it had duties which it then described as "fiduciary duties" to the beneficiaries.

55 The question is whether, in these circumstances, the defendant in 1987 and more particularly in 1988, given its state of knowledge, could as a matter of law, fail to advise the beneficiaries that required contributions were not being made. The defendant must have known that if it did not so advise the beneficiaries, it is unlikely anyone else would.

56 For the reasons already mentioned, the defendant's "exonerations" provide no defence to the plaintiff's claim. Was the defendant's duty of care so limited that it was not required to react?

57 The trial judge framed the question as whether there was any obligation to volunteer information to the beneficiary. With respect, I think that is far too narrow. In my view, "true" trustees have obligations of prudence to protect not just the corpus of the trust, but also the interest of the beneficiaries from the ongoing operation of the plan.

58 I postulate a simple example. Assume that the Company appoints an investment manager, and that that manager instructs the trustee to invest the corpus, or so much thereof as the plan permits, in the subordinated securities of the company. (This is an extreme example because most plans provide investment rules that must be followed.) Absent such rules, can it seriously be argued that a trustee owes no larger, general duty of prudence respecting the trust which transcends the four corners of the agreement? In this respect, I agree with the comments of Dickson J. (as he then was) in Fales v. Canada Permanent Trust Co., [1977] 2 S.C.R. 302, at p. 316, although stated in a different context. He said, no matter how wide their discretionary powers:

> ...a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence, nor from the application of common sense.

59 In my view, there is more involved in this case than volunteering information. In the ordinary course of its contractual responsibility as administrator or custodial trustee, the defendant became aware, as found by the trial judge, that required contributions were not being made. In view of the fact that payments were flowing out of the fund, a prudent administrator, in my view, was required to make inquiries of the Company and possibly of the actuary which would have permitted the defendant to make a prudent decision about what should be done to protect the beneficiaries. The duty of care it owed to the beneficiaries did not permit it to do nothing when the plan was at risk. Simple inquiries would have filled in any gaps that existed in the defendants understanding of the context.

60 Thus, within the scope of its duties as administrator, it is my view that the defendant breached its duty of care to the beneficiaries when it failed to respond to the discontinuance of Company contributions.

61 Once it is concluded that the defendant had a duty to respond to this discontinuance of Company contributions, it follows that the defendant was obliged to inform the beneficiaries that the plan was at risk.

62 A further matter that must be considered is the $30,000 payment made by the Company for regular pensions in November, 1988. It might be argued that this payment supports the views of the trial judge that the Company indeed appeared to be taking a "holiday" and that the defendant, not being required to make collections, was entitled to assume that payments would be made as required.

63 I am unable to accept that view. That payment, except for the $2,374.50 paid in October, 1987, was the first payment for regular pensions since November, 1986, a period of 23 months. At the date of that payment, there had been only four undersized payments for enriched pensions in early 1987, and none in the first eleven months of 1988.

64 In my view, the defendant as a prudent trustee had an obligation to respond appropriately before the $30,000 payment was made.

65 Because he was dismissing the plaintiff's action, the trial judge did not undertake any damages assessment. The plaintiff called an actuary to estimate the plaintiff's loss at $291,216, which includes a past loss, after giving credit for pension payments actually received of $49,904, plus the present value of the future loss, as of the date of trial in March, 1994, of $241,312.

66 On the other hand, the defendant urges that, if necessary, the question of damages ought to be sent back to the trial court because of the need for decisions on the life expectancy of the plaintiff, and on the difficult questions of mitigation or contributory negligence arising because of evidence that the plaintiff knew, or suspected from his own sources, that the plan was underfunded.

67 I agree that this question should be remitted to the trial court. In this judgment, I have pronounced only on the obligation of the defendant to warn the plaintiff of the risks created by the failure of the Company to make required payments. The defendant is not foreclosed from arguing such other defences as it may be advised.

THE WINDING-UP

68 In the alternative, the plaintiff claims that the defendant failed to protect him during the winding-up of the plan. Specifically, the plaintiff argues that the defendant could not properly appropriate the corpus of the trust to purchase 70% pensions for other members with funds to which

he was equally entitled. If the plaintiff succeeds on this ground of appeal, he would be returned to the equivalent of a 70% pension.

69 It appears from the evidence that in 1985, the Company was expecting substantial numbers of early retirements consequent upon the downsizing of the company's operations. Accordingly, the advice of the actuary was requested. He drafted an amendment to the plan, called P-9, which specified several kinds of improved benefits and necessary funding requirements. Clause 7 imposed restrictions on the amount of pensions that could be paid, and clause 8 provided that in the event of termination or winding-up, clause 23(c) of the plan (which provides for the distribution of the assets upon "termination" of the entire plan) would apply only:

> ... to that portion of the additional pension benefits which can be financed by the extent of the special payments made in respect of such benefits.

70 If adopted as an amendment to the plan, clause 7 of P-9 might have limited the amount of the plaintiffs pension, and clause 8 would have permitted distribution for enriched pensions, upon a winding-up, only to the extent such enrichments had been funded by special Company contributions. P-9 was not adopted until 1991, however, and clauses 7 and 8 were not included in that amendment. It may have been for this reason that the trial judge found that the plaintiff's original pension was a proper one under the plan.

71 The basis for the plaintiff's reduced pension (below 70%) resulted from a recommendation of Mr. Taylor, the plan's actuary, that the plaintiff's original pension represented an overpayment, and that a drastic "claw-back" was necessary to correct the account. P-9, as originally drafted, was the basis for this recommendation because the actuary concluded, wrongly in the case of the plaintiff, that some of these enriched pensions did not comply with its terms.

72 The trial judge dealt with the merits of this claw-back this way:

> When he [Taylor] decided that Mr. Froese had been overpaid, Mr. Taylor was out of his own field of expertise. The basis for his decision was the absence of formal documentation in the files of Johnston Terminals.
>
> Non-lawyers attach much more significance to "technicalities" than lawyers do, despite popular belief to the contrary. No competent lawyer would have been buffaloed by the state of Mr. Froese's personnel file. The pension of Mr. Froese had gone to the Board of Johnston Terminals, it had been approved, and there was express documentation of that, although certain documents of a standard type were either missing or had never come into existence. The rationale for concluding that Mr. Froese had been overpaid "permitted form to triumph over substance", in the words of the Ontario Court of Appeal in Truckers Garage Inc. v. Krell.
>
> I agree with the contention of Mr. Froese that his pension could have passed muster under the applicable laws and regulations.

I conclude that the amount of the original pension was lawful and proper.

73 I accept the judge's conclusions in this respect. As the plaintiff cannot recover his loss from the Company, he must succeed, if at all, against the defendant, who decided to reduce the plaintiff's pension and then to give up the fund, even though it knew that funds deducted from the plaintiff's pension would be used to purchase annuities for other beneficiaries.

74 I next propose to review some of the history leading up to the reduction of the plaintiff's pension and the winding-up on the plan.

75 A memo dated October 28, 1991, based largely upon information obtained from the actuary, discloses several significant facts which I shall paraphrase as follows:

1. The plan was in a deficit position probably since the market crash in [October] 1987;
2. Prior to 1987, the Company authorized additional payments to select pensioners, including some senior executives, as an inducement for them to retire early. The liability for funding these additional pensions was that of the Company.
3. The Company did not have resources to contribute the amounts necessary to overcome the deficit, and was suggesting that both the actuary and the defendant had some responsibility in this connection;
4. The defendant was not anxious to advance any claim against the actuary because his firm was a considerable source of new business for the defendant;
5. The Company expected that it would have to renege on its commitment to the unfunded pensioners.

76 On November 20, 1991, in another memo, the defendant recognized its own potential liability. It states the purpose of the memo to Head Office "is to formally report to you a potential liability we may have regarding the above mentioned pension plan."

77 In December, 1991, the defendant was expecting calculations from the actuary for the wind-up of the plan. That this question was very much in the mind of the defendant's officers is demonstrated by a letter dated January 15, 1992, from the defendant to the actuary seeking information and asking hard questions. It ends with this statement:

> I would appreciate hearing from you at your earliest convenience regarding these concerns we have expressed. In order for all parties to ensure that any payouts from the Plan are effected in accordance with the provisions of the Plan, we may be required to engage external legal counsel. <u>As well, we would want to ensure that the funded status of the Plan is clarified to our satisfaction in order to enable us to properly discharge our fiduciary obligations to the Plan Members.</u> (emphasis added)

78 On January 15, 1992, in a memo to Head Office, the defendant wrote:

> As this issue gets more contentious each day, I think it is time to engage external legal counsel to ensure that the interests of beneficiaries are handled appropriately.

79 On February 4, 1992, the defendant's officers met with the actuary, Mr. Taylor, who advised that certain pensions were enriched between 1985 and 1988, and that while "some of them were proper, others were doubtful and others were probably invalid." Recipients of questioned payments are not identified in this memorandum.

80 The next day, the defendant received a copy of a legal opinion obtained by the Company dated August 23, 1991. This opinion assumed contributions by employees and the Company were suspended as of December, 1988 (which was not true: employees' contributions, as the defendant knew, continued into 1990). Notwithstanding this, the opinion concluded, correctly I think, that the plan had not been terminated. This opinion estimates a $2.5 million shortfall, of which $1 million was attributed to the market crash, and $1.5 million to "unauthorized payments." The evidence does not disclose how this latter amount is calculated. I suspect it relates largely to the payment of enriched pensions and not primarily to alleged miscalculations of original pensions.

81 On March 20, 1992, the actuary, Mr. Taylor, submitted a comprehensive report which was obviously the basis for the recalculation, reduction and claw-back of the plaintiff's pension. The following comments about the report are necessary.

82 The report states:

> We have estimated that the assets of the plan will be sufficient to only finance 70% of basic pension benefits. The amount of individual reduction will vary, with an estimated reduction of 30% or more, but the final calculations of these reductions will depend on the procedure used to wind-up the plan and, in turn, the wind-up procedure will have to take into account certain aspects of trust law and the plan text. In particular, the wind-up procedure will have to take into account the financial consequences of the corporate downsizing which was effected through the early retirement program. This program commenced in 1983 and, we understand, ended in 1987.

83 The report stated that 36 out of 96 current pensioners were provided with early retirement improvements under either P-7 or P-9, although he discovered that some amendments, prepared in 1985, were not ratified until "a later date". This obviously refers to P-9, which we now know was not adopted until 1991.

84 Under the heading "Company Contributions", it was stated:

> We understand from discussions with the Company that, although some Company contributions were made following the delivery of our actuarial valuation report to the Company in December, 1986, the Bank of B.C. called its loans to the Company in July of 1987, in the amount of some $16 million and placed a monitor in the Company (until July 1988), and that the Company was during this period permitted to only pay the expenses to operate the Company in order to commence the liquidation of various assets. During this period no Company con-

> tributions were made and to the best of our knowledge and understanding, no Company contributions have been made since July, 1987.
>
> Despite the suspension of Company contributions from July, 1987 [for early retirement pensions], the pension plan continued to credit benefits for service, and employee contributions continued to be deducted and remitted to the plan trust until December 31, 1988.
>
> Solvency Valuation at June 30, 1987
>
> As a result of the Company only being permitted to pay operating expenses, the Company was concerned as to the solvency status of the plan and instructed us to make an estimated solvency valuation as at June 30, 1987. Based on data supplied to us, which we considered to be reliable, we estimated that the plan had a small surplus on a solvency basis, of about $15,000, and that this surplus had developed primarily because of gains from investment returns up to that date.

85 With apparent regard to Granholm and J. Miller, the report states:

> In the course of a previous review of the plan records and financial statements we identified certain payments that appear to have been made from the plan trust in error, to 2 retired members. These payments involve amounts that were due from the Company to the ex-employee, and this matter is now the subject of discussions between the Company and Montreal Trust. Our solvency valuation has accounted for these payments as amounts due to the plan and trust, and we understand that steps are being taken to recover these over-payments, either through the corporate trustee, Montreal Trust, or by way of a charge against future pension benefit entitlements.
>
> If these over-payments are not recovered, together with investment earnings thereon, this will have an adverse effect on retired members over and above our current calculations. Our recommendation on the procedure to be adopted to recover these over-payments is given later. The accumulated value of these over-payments to date is about $200,000.

86 With possible reference to the plaintiff, it is stated:

> In the course of setting out the procedure for wind-up, we requested and were provided in December, 1991 with the personnel files of all of the employees, and have made our best efforts to review those files to determine which pensioners were early retirements, and how the pension benefit improvement was calculated. At this time, some of the individual files show no records of how the calculations were done. A few of the early retirement improvements are not consistent with Amendment P-9 and we are forwarding material on these cases to the Retirement Committee.

87 It is obvious the actuary concluded the plaintiff had been substantially overpaid and this error on his part was carried right through into the wind-up of the plan.

88 On page 8 of the report, the actuary clearly indicates that he believed that P-9 included the missing clause 8, and that all enriched pensions for retirees after January 1, 1983, would be subject to that clause. The defendant must have been aware that this was factually incorrect because, as administrator of the plan, it must have known that clause 8 had never been adopted.

89 Under the heading "Terms of Wind-Up" the actuary stated:

> 3. Under paragraph 8 of Amendment P-9, none, or virtually none, of the improvements in pension benefits provided to early retirements has been financed by additional special payments by the Company. Under clause 8 of this amendment, upon termination or wind-up of the plan, these additional pension benefits will have to be discontinued.
> 4. If the plan is wound-up effective as of December 31, 1988, which is when the plan discontinued future service credits, then, applying paragraph 8 of Amendment P-9, all improvements in pension benefits that were paid after that date should now be recovered. This recovery would be by way of implementing a charge on an individual basis against future pension benefits such that the charge has a current actuarial equivalent value of all such payments made since December 31, 1988, accumulated to date at a market rate of interest. (emphasis added)

90 On page 10 of the report, the actuary referred to several outstanding matters that were yet to be resolved, and said a legal opinion would be required "on the final wind-up of the plan". "Correspondingly," he advised, "it is not possible to finally wind-up this plan until these matters have been resolved or clarified." As will be seen, no such opinion was ever obtained.

91 The report then recommended, as an interim measure, the immediate reduction of pensions to 70% of what would have been paid without enrichment, and a claw-back of payments already made. It also included a recommendation that:

> ...when the plan is finally wound-up, and assuming that the interim measure described above shall be adopted as the final calculation of the future pension benefit entitlements of each member, then the beneficial interests of each member shall be calculated...for winding-up the Plan.

92 Thus, without clause 8 in the amended P-9, it was not necessarily correct, as assumed in the report, that pension improvements would only be payable upon a winding-up to the extent that special funding had been provided.

93 I pause to mention that, in cross-examination, the actuary admitted that the report contained several errors and that it was misleading.

94 Clause 8 was the basis for reducing enriched pensions. In proper cases, a claw-back for miscalculated pension payments could be recovered by way of set off. The plaintiff suffered deductions back to a lower level and for a claw-back of benefits paid although there was no reason for him to suffer deductions on either ground.

95 On March 20, 1992, a trust officer of the defendant wrote a memo questioning the accuracy of the actuary's report and its fairness to Granholm and J. Miller. He noted:

> Recovery of pymts [sic] due to errors in original calculations have not been specified.

But nevertheless, he advised:

> I told [the actuary] in principal [sic] the report and method of calculation looked fine. We do have a fiduciary resp. [sic] to the beneficiaries and could not commit without review by our legal counsel.

96 Obviously with prior knowledge of this report, the Company wrote and sent a letter to the plaintiff dated March 19, 1992. This letter (the Douglas letter) enclosed a copy of the report, and advised in part:

> Effective April 1, 1992:
>
> > Basic pension benefits are reduced to 70% of the current amount;
> >
> > For those members who retired before January 1, 1983 and who also received an enhanced pension benefit in addition to their basic pension, the enhanced pension benefit is reduced to 70% of the current amount;
> >
> > For those members who retired after January 1, 1983 and who also received an enhanced pension benefit in addition to their basic pension, the enhanced pension benefit is discontinued. Also for these members, payments of these enhanced pension benefits made since December 31, 1988 are to be recovered by way of a reduction in future pension entitlements. The amount to be recovered is calculated as prior payments of enhanced pension benefits plus interest at 12% p.a. up to October 31, 1991. This amount is then set equal to the estimated market value of an annuity, so as to calculate the amount of reduction needed;
> >
> > Similarly, in cases where any excess payments or miscalculated payments have been identified in the audit, prior payments of this type, plus interest, are to be recovered by way of an additional reduction.

97 Attached to the plaintiff's copy of this letter was a statement showing that his pension should originally have been calculated without improvements; that is, at $1,746 rather than what he had been receiving, namely $2,584. This new pension amount was then reduced by 30% to $1,222.59. In order to recover past improvements, a claw-back of $658.50 was applied, leaving a final pension of $564.09. This letter does not mention winding-up the plan, but that possibility is mentioned in the report.

98 Thus, the report of the actuary, which does not identify the plaintiff except possibly as one whose file had been examined, was adopted by the Company and by the defendant as a valid basis for a recalculation of the plaintiffs pension, a reduction of 30%, and a claw-back, for the reasons already stated. These reasons included both alleged error in the original calculation, and an acceptance that enrichments could not be paid in the forthcoming wind-up because of clause 8 of P-9,

which had never been adopted. The recommendations were subject to a detailed legal opinion which was never obtained.

99 Three days later, on March 23, 1992, the Company delivered a Resolution to the defendant in the following terms:

> JOHNSTON TERMINALS & STORAGE LTD.
>
> "The Board of Directors reviewed the report dated March 20, 1992, prepared by Mr. Les Taylor of The Wyatt Company regarding wind-up the Pension Plan, a copy of which is attached hereto and forms part of these minutes.
>
> UPON MOTION DULY PROPOSED AND SECONDED IT WAS UNANIMOUSLY RESOLVED THAT the Board accept the recommendations contained in The Wyatt Company report.
>
> UPON MOTION DULY PROPOSED AND SECONDED IT WAS UNANIMOUSLY RESOLVED THAT the Board instruct the Pension Committee to advise Montreal Trust to amend benefit payments to all plan members effective April 1, 1992, in accordance with The Wyatt Company Report and the calculations contained therein."

100 There must have been some accompanying schedule showing the amount of reductions to be paid to individual members because the plaintiff's monthly pension was reduced as of April 1.

101 At this point, the defendant obtained a legal opinion on April 6, 1992. The opinion was based only on the agreement, the plan and amendments, the actuarial report, and the Resolution just quoted. It advised only that, on the basis of the foregoing documents, it would be proper for the defendant to amend benefit payments to all plan members on April 1, 1992, in accordance with the actuarial report and its calculations. The author obviously assumed the correctness of the report, and clearly took a narrow view of the defendants obligation to the beneficiaries, particularly individual beneficiaries who were being singled out for special treatment. Although the report identified only two retired members (Granholm and J. Miller) who were said to be in receipt of erroneous benefits, the plaintiff's pension entitlement, and possibly that of other pensioners, was also re-calculated. The opinion does not mention the agreement's certification requirement, nor does it purport to advise on the proposed winding-up of the plan.

102 After this, there was period of inactivity. The defendant's attitude is probably summarized by its solicitor, who noted, in a memo to file dated March 31, that the Director's Resolution had "modified" the plan and that, "[U]nder the circumstances, it seems that the only course of action, given the shortfall in the assets of the fund is to do as recommended by the [actuaries'] Report." With respect, I do not agree that the Resolution modified the plan. If it did, it would be invalid because s. 23(a) of the plan protects earned benefits.

103 It is unfortunate that the defendant did not respond in any way to the different and unequal treatment recommended for individual pensioners, or to the larger responsibilities it admitted it owed to the beneficiaries.

104 The plan was finally wound up in July, 1992, by transferring the corpus of the fund to a life insurance company for the purchase of reduced individual annuities. The Company's instruction for the disbursement of the fund is contained in a letter to the defendant dated July 31, 1992:

> Herewith your authorization to disburse funds and follows:
>
> - To Montreal Trust usual management fees to 2 p.m., July 31/92. We do not expect to be charged for your outside legal counsel. You should take into account that there will be no assets in the trust at month-end closing. Please notify Wyatt by fax of your final number.
> - To Wyatt, fees to 2 p.m. July 31, 1992, to be notified to you by fax.
> - Refund payments to deferred pensioners, Wyatt will fax to you the amounts. These are to be held in a suspense account, under the same registration number, pending completion of "roll-over" documentation.
> - Philips Hager North will not charge for July since there are no month-end closing assets.
>
> Balance of trust at 3 p.m. to be transferred to Standard Life, attention Don Liesch.

105 The procedure for winding-up the plan is specified in s. 23(c) which provides in part:

> (c) Termination
>
> The Company may at any time, by resolution of its Board of Directors, terminate the Plan by filing with the Trustee a certified copy of the resolution of the Board of Directors authorizing the termination of the Plan and trust.
>
> ***
>
> When the assets have been allocated as heretofore provided, the Trust Fund shall be terminated. The interests of those members, retired members, former members, their beneficiaries and joint annuitants described in paragraph (ii) shall be paid to a life insurance company to purchase immediate or deferred life annuities, with payments commencing at age sixty-five (65) ...

It is clear, however, that such termination may only be done in accordance with the terms of the Agreement.

106 It is apparent that the plaintiff was wrongly deprived of a substantial part of his pension because no one questioned or checked the conclusions or assumptions of the actuary. The defendant argues that it was not a part of its responsibility to check the calculations made with respect to every beneficiary. In a case such as this, there could be thousands of employees and it would be unreasonable to expect the trustee to descend into that kind of detail.

107 But it is necessary to consider whether the casual approach taken with regard to these drastic measures conformed with the defendant's duty of care. The Company resolution merely adopted

the recommendation of the actuary's report, which is expressly stated to be subject to a number of other matters and to a legal opinion that was not obtained, except to the extent already described. The report was singularly lacking in detail about the plaintiff or any beneficiaries for whom re-calculations or claw-backs were being recommended. It appears the defendant accepted without hesitation or inquiry the calculations submitted with the report.

108 After the April 1 reduction in benefits, the actuary explored the purchase of annuities as authorized by s. 23 of the plan, and eventually settled upon a specific insurance company. Except for the letter of instructions, however, neither the Company nor the defendant passed in a formal way upon the final disposition of the fund, or upon the amount of the individual annuities. The defendant acted solely upon the report, the resolution and the Company's letter of instruction. It is unnecessary to consider whether the foregoing was sufficient as between the Company and the defendant. It is another question whether it was sufficient as between the defendant and the beneficiaries. I add that, in my judgment, the April and July directions given to the defendant by the Company were parts of a single scheme to carry out the recommendations of the actuarys interim report which, as I have said, was not a final report, and was manifestly premised incorrectly.

109 The result of all these procedures was to put the fund beyond the reach of the plaintiff whose pension entitlement had been incorrectly and permanently reduced by over $2,000 a month. I say "incorrectly" because of the findings of the trial judge.

110 The first question is whether the defendant owed any duty of care in connection with the wind-up of the plan. I have no doubt on that question. As administrator of the plan, it was clearly within the area of the defendant's responsibility to ensure that the plan was properly wound up.

111 The second question is whether the defendant breached its duty of care to the plaintiff as a beneficiary during the wind-up of the plan.

112 So far as I can ascertain, the defendant had no authority from the Company to carry out the recommendations of the actuary apart from the March 20, 1992, resolution quoted above, and the directions contained in the letter of July 31, 1992. In fact, at trial, the resolution was the basis upon which the defendant tried to justify what it had done to the plaintiff's pension. The actuary gave this evidence:

> Q Sir, is it your position that the wind-up, the division of assets on wind-up is ultimately justified by the fact that the board of directors approved your report?
>
> A It was then.
>
> Q I see. Was it your position that it really didn't matter what amendment P-9 said?

A No.

Q Did it matter at all that P-9 wasn't enacted if you chose to wind-up the plan?

A I'm sorry, yes.

Q That was your position?

A That was my understanding that, yes, in the actual final adjustment to cheques for April 1st.

113 The defendant's Factum on this appeal states at p. 15:

> In any event, Montreal Trust is protected by the exculpatory language in paragraphs 2,3 and 4 of Clause Ninth. Under paragraph 2, Montreal Trust was entitled to rely upon the Companys resolution and the Wyatt report received in March 1992 and the directions it received in July 1992 to transfer funds to Standard Life. Paragraph 2 also specifically stated that Montreal Trust did not have to make any investigation or inquiry. Paragraph 3 stated that Montreal Trust was not responsible for the adequacy of the Trust Fund to meet and discharge liabilities under the Plan. Paragraph 4 provided more generally that Montreal Trust was only liable if it was negligent or wilfully misconducted itself. The evidence demonstrated that Montreal Trust was not negligent and it did not wilfully misconduct itself.

114 The Trust Agreement provides:

> SECOND: Subject to the provisions of Article THIRD hereof, the Trustee shall from time to time on the written directions of the Company certified to be in accordance with the terms of the Plan make payments out of the Trust Fund to such persons in such manner, in such amounts and for such purposes as may be certified to be in accordance with the terms of the Plan and upon any such pay-

ment being made, the amount thereof shall no longer constitute a part of the Trust Fund.

The Trustee shall be under no liability for any payment made by it pursuant to the direction of the Company certified to be in accordance with the terms of the Plan and shall not be under the duty of making inquiries with respect to whether any payment directed by the Company is made in pursuance of the provisions of the Plan.

***

NINTH: The Trustee shall not be liable for the proper application of any part of the Trust Fund, if payments are made in accordance with the written directions of the Company certified to be in accordance with the terms of the Plan as herein provided, nor shall the Trustee be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Plan. All persons dealing with the Trustee are released from inquiry into the decision or authority of the Trustee and from seeing to the application of any moneys, securities or other property paid or delivered to the Trustee.

The Trustee shall not be liable hereunder except for its own negligence or wilful misconduct. (emphasis added)

115 The plaintiff argues that neither the said resolution nor any other documentation constituted authority to make payments out of the fund for the purchase of 70% (or less) annuities because of the absence of any certification as required. As a beneficiary, untrammelled by any contractual "exonerations", the plaintiff asserts a right to sue the defendant for loss caused by these wrongful payments. The trial judge dealt with this argument as follows.

Mr. Froese argued that, in acquiescing to the "overpayment" reduction, Montreal Trust did not receive from Johnston Terminals a direction which included the words "certified to be in accordance with the terms of the Plan", thus taking the instruction out of the ambit of the protection of Article SECOND of the trust deed. While it may be said that, generally, the law has moved away from formalities, it equally may be said that those which are used in modern times may be taken to have been consciously accepted. Here, we have the glimmerings of an obligation on the part of Montreal Trust to demand a solemn step on the part of Johnston Terminals, in order to immunize itself from liability. The certification requirement, however, was meant to govern the liability of Montreal Trust to Johnston Terminals for a wrongful payment. It is addressed to payments made. What we are dealing with here are payments refused. Additionally, the second branch of Article SECOND, which is several, negatives any duty of inquiry.

More to the point, Article TWELFTH provides that, on the termination of the trust, the trust fund shall be paid out by the Trustee as directed by the Company. Here, Johnston Terminals, with the collaboration of Mr. Taylor, directed

Montreal Trust to purchase the annuity on the basis of the "overpayment" analysis which I have found to be wrong. Under the trust deed, Montreal Trust was entitled to rely on these instructions.

It is not that Mr. Froese is bound by the terms of the trust deed. He is not. Among other things, he is not caught by Article EIGHTH, which purports to immunize Montreal Trust from any action brought by him. It could not be more obvious that this provision has no effect against him. It is, rather, that the obligations of Montreal Trust were defined in those parts of the trust deed which continued to apply to it after 1985.

Montreal Trust was entitled to accept the instructions of Johnston Terminals as to the overpayment and the clawback. It had no obligation of independent investigation.

116 It is apparent that the trial judge considered that the defendant's contractual responsibility (and exonerations) defined the limits of its duty. With respect, I think that is wrong. As I have already mentioned, the agreement defines the function -- custodian-administrator -- within which the duty of care operated, but that does not saddle the beneficiaries with all the terms of the agreement. It follows, in my view that the trial judge was also wrong when he concluded the defendant was entitled to accept (and act upon) these casual, uncertified instructions without question and without prudence.

117 In my view, there was no need for the defendant to make independent inquiries or investigations in order to know that the beneficiaries, or some of them, were at risk. At the very least, the defendant knew or should have known that the report upon which the entire winding-up was based was seriously flawed; it knew the Company was seriously in default and adverse in interest to the beneficiaries; it knew the proposed winding-up amounted to forgiveness of the Company's default; it knew the report recommended and the Company confirmed that the files of individual beneficiaries had been "reviewed" and were being treated differently on questionable legal grounds; it knew no legal opinion had been obtained; it knew, because of the failure of the Company to make required contributions, that the defendant itself might have some responsibility; and it must have observed that the Company had not certified that the alienation of the entire fund in the manner and for the purpose proposed was authorized by the plan.

118 In these circumstances, in my view, it was imprudent and negligent to hand over the fund regardless of the question of certification. The defendant breached its duty of care to the plaintiff when it gave up the fund in these circumstances. I recognize that, as a "real trustee", the defendant was in an impossible position, but that did not permit it arbitrarily to adopt a course of convenience. It was required to be careful and as trustee to maintain an even hand between these obviously conflicting interests. It could not do so by putting the fund out of the reach of beneficiaries it knew were being arbitrarily deprived of substantial parts of their pensions.

119 I test my conclusions by asking what the position of the defendant should be if, as a "real trustee", it had received even a certified direction to hand over the fund for a purpose it knew would put it beyond the reach of the beneficiaries. Breach of trust, or at least negligence, spring immediately to mind. I have no difficulty concluding that the defendant breached its duty of care to the

plaintiff and it is not necessary to select just one of those courses of action. The plaintiff is entitled to succeed on both. Such breach, in my judgment, directly caused or contributed to the cause of the losses I have described.

120 I do not say that the defendant was required to check every calculation or to satisfy itself that every member of the plan was treated with perfect correctness, as that might be an impossible task in a large or even medium-size pension plan. A trustee must, however, respond to obvious issues of danger to beneficiaries which were, in this case, easily identified by the defendant upon reading the actuary's report. At the very least, prudence required the defendant to act on the basis of independent, informed advice when it knew from reading the report and the consequent calculations that one or more of the beneficiaries were being deprived of substantial portions of their pensions on highly doubtful grounds. The defendant also had the option of seeking the opinion of the court but there is no suggestion in the evidence that that was ever considered.

121 I have also been concerned by the failure of the plaintiff to take any steps to prevent the dispersal of the fund. His solicitor was in touch with the defendant shortly after March 20, 1992, but nothing further was heard from him. In this respect, however, the report contemplated a legal opinion, and the plaintiff was entitled to assume that such an opinion would be obtained before the plan was wound up as suggested in the report. In any event, the plaintiff was not obliged to bring proceedings prior to the winding-up of the plan.

122 Thus I conclude that the plaintiff is also entitled to succeed on his alternative argument. I suppose it is possible that, but for the reduction and claw-back of the plaintiff's and some other pensions, all other pensions might have been less than 70%. I leave that to counsel to consider. The plaintiff is entitled to have his pension supplemented by an award of damages, either by way of periodic payments, or by a present value lump sum to bring his pension up to 70% (or as may be adjusted) of his original pension.

123 I would not like to leave the impression that custodial trustees will always be subject to liability beyond the terms of the trust agreement. The Trustee does, however, have (and has in law always had) a general duty of care to beneficiaries which, on the facts of this case, was not discharged.

124 The defendant claims relief under the Trustee Act R.S.B.C. 1979, c. 414. With respect, I would not accede to that application. The defendant contributed in a substantial way to a serious loss suffered by the plaintiff and I would not deprive him of his remedy on a discretionary basis.

125 I would allow the appeal to the extent I have mentioned. I would remit to the trial court the question of whether the plaintiff is entitled to damages for the failure of the defendant to warn him in 1987 or 1988 that his pension was at risk. The plaintiff is entitled to damages at least in an amount sufficient to restore him to a 70% or lesser adjusted pension as directed above.

McEACHERN C.J.B.C.
WILLIAMS J.A.:-- I agree.

The following is the judgment of:

126 GIBBS J.A. (dissenting):-- The appellant seeks reversal of an order in the court below dismissing his claim against the defendant. The third and fourth party proceedings have been severed and are being held in abeyance pending the decision on this appeal.

127 The claim sounds in tort. It is founded upon allegations of breach of duty on the part of Montreal Trust in the administration of a pension fund forming part of a pension plan. The plan was set up by Johnston Terminals Ltd. in July of 1959 and terminated in March of 1992 at a time when there were insufficient funds to meet all of the plan membership entitlements.

128 The plaintiff was receiving a pension when the plan was terminated. On termination his pension was sharply reduced hence this proceeding. He claims compensation from Montreal Trust of approximately $240,000 to restore that to which he says he was entitled and would have enjoyed but for the aforesaid breaches of duty.

129 There is no claim against Johnston Terminals even though it seems clear that failure by Johnston Terminals to maintain an adequate level of employer funding during the latter years of the plan was the direct cause of the plaintiff's loss.

130 Montreal Trust was not a party to the pension plan under which the pension fund was created. But the settlor, Johnston Terminals, made provision in the plan for Montreal Trust to perform functions under contract limited to custody and management of the pension fund including the investment of it in a permitted class of securities:

> TRUST FUND
>
> 2. All contributions of the members and of Johnston Terminals & Storage Ltd. and of its subsidiary companies as set forth in Exhibit A hereto (hereinafter called "the Company") will be paid into the Trust Fund (hereinafter called "the Fund") established under the terms of the Trust Agreement executed between the Company and Montreal Trust Company and dated July 1, 1959
>
> The Fund will be administered by the Montreal Trust Company until or unless a successor trustee or trustees are appointed. The Trustee shall invest the fund in securities and loans of a class permitted by The Pension Benefits Act, 1967 of Alberta (hereinafter referred to as "the Alberta Act") and any regulations thereunder or any amendment thereto.

131 Johnston Terminals retained all of the other responsibilities for the management and operation of the pension plan. Montreal Trust is not mentioned anywhere else in the plan.

132 Under Clause 11 of the pension plan Johnston Terminals covenanted each year to make a contribution to the pension fund sufficient in amount, when added to the value of the assets of the fund and the employee contributions, to fund the pension plan liabilities:

> COMPANY CONTRIBUTIONS
>
> 11. The Company shall from time to time but not less frequently than annually, contribute such amounts as are not less than those certified to by an Actuary as necessary to provide for payment of the pension benefits accruing to members during the current year pursuant to the Plan and shall make provision for the proper amortization of any initial unfunded liability or experience deficiency with respect to benefits previously accrued to the

credit of members after taking into account the assets of the Fund, the contributions of the members during the year and such other factors as may be deemed relevant.

133 As the annual contribution of Johnston Terminals turned in part upon the value of the pension fund assets, the investment performance of the pension fund was of significant interest to Johnston Terminals. Over time it became dissatisfied with the investment performance and finally, on May 23, 1985, it transferred the investment responsibilities from Montreal Trust to M. K. Wong Associates. It is common ground that a precipitous fall in stock market values in October of 1987 had a seriously adverse impact on the value of the assets in the pension fund.

134 With the removal of the investment responsibilities Montreal Trust was left, in terms of the pension plan and at the critical times, only with the obligation to administer the pension fund.

135 After 1986 Johnston Terminals made only sporadic contributions to the pension fund. The fund was not sufficiently endowed to be self funding in the long term although the trial judge found as a fact, not disputed by either party, that there would have been sufficient to meet the plan requirements if the fund had been wound up in 1987 or 1988. Under Clause 23 of the pension plan Johnston Terminals was empowered to terminate the plan and distribute the fund by resolution of the board of directors. That formal termination step was not undertaken until March of 1992.

136 The allegations of breach of duty against Montreal Trust are contained in paras. 6, 17 and 21 of the statement of claim. There are three, all expressed as breach of trust or, alternatively, negligence:

1) failure to ensure that the plan was fully funded;
2) failure to warn plan members of the failure of Johnston Terminals sufficiently to fund, and
3) purchase of annuities in a reduced amount without the consent of the appellant and knowing of his "claim".

137 Here is the precise text of the relevant paragraphs of the statement of claim:

> 6. By virtue of s. 11 of the Johnston Pension Plan and the defendant's position as trustee, or, in the alternative, the duty of care owed to the plaintiff by the defendant, it was the defendant's obligation:
>
> (1) to take the necessary steps to ensure that the Plan was fully funded or, in the alternative,
> (2) to notify the members of the Plan, the cestuis que trustent, including the plaintiff, of Johnston's failure to fund.
>
> . . .
>
> 17. The defendant committed a breach of trust, or in the alternative, was negligent, in failing to fulfill its obligations as set out in paragraph 6 above in response to Johnston's failure to fund its Pension Plan after 1986, and as a result, the Plaintiff has suffered loss and damage.
>
> . . .

> 21. The defendant purchased the annuities in breach of trust or, in the alternative, negligently, without the plaintiff's knowledge or consent, with knowledge of the plaintiff's claim, and thereby made it impossible for the plaintiff to receive from the funds held in trust for the Johnston Pension Plan the amounts the plaintiff was entitled to receive.

138 A significant aspect of these alleged breaches of duty is that none of the three is specifically imposed upon Montreal Trust in either the pension plan or the separate contract between Johnston Terminals and Montreal Trust. It follows that the duties alleged to have been breached must flow from the common law and attach by necessary implication to the duties that are specifically imposed by the trust instrument. It is upon this basis that the appellant rests his case, contending that the pension plan is the trust instrument and, in para. 4 of the statement of claim, that "The defendant [Montreal Trust] is the trustee of the Johnston Pension Plan". However, the liability structure collapses if these latter contentions are not supported by the evidence, and they are not, at least to the extent of rendering Montreal Trust liable.

139 On the evidence this is not a traditional trust case where there is a single trust instrument and a single trustee duty bound to follow the terms of the trust instrument. Here there are two trust instruments each with a scope different from the other and each with its own trustee. At p. 104 of the Law of Trusts in Canada, 2 Ed., 1984, Dr. D.W.M. Waters described the relationship when there are two trustees with responsibilities divided between them, as is the case, and in the circumstances present, in the case at bar:

> The custodian trustee is a person, natural or corporate, who is vested with title to the trust property, while the management of the trust is left in the hands of other trustees who are known as the managing trustees. In Canada the term is used in connection with pension or other investment trusts when the portfolio is vested in so-called custodian trustee, but the investment policy and decisions are determined by investment managers or consultants.

140 The Montreal Trust responsibilities were confined by Clause 2 of the pension plan to administration of the trust fund created by contributions. It was, therefore, the custodian trustee vested with title to trust property. The management of the trust (the pension plan) was left with Johnston Terminals which thereby fulfilled the role of managing trustee.

141 It is obvious from this division that the burden on the appellant at trial was to fix Montreal Trust with liability notwithstanding the limited role allotted to it. The appellant sought to discharge the burden by contending that Montreal Trust became trustee of the pension plan by way of incorporation of the pension plan by reference into the separate agreement through the wording of the first recital in the separate agreement:

> WHEREAS the Company has adopted a Profit Sharing Pension Plan for certain of its employees (hereinafter referred to as "the Plan"), a copy of which as amended from time to time is attached hereto and forms a part hereof; . . .

142 The contention cannot be sustained. The reference does no more than fix Montreal Trust with knowledge, constructive or actual, of the terms of the pension plan. It does not purport to im-

pose pension plan trustee (managing trustee) duties upon Montreal Trust. Neither do any of the other provisions of the separate agreement or the pension plan. There are, therefore, no duties specifically allotted by either the separate agreement or the pension plan to Montreal Trust to which the common law duties alleged in the statement of claim to have been breached can attach by necessary implication. The consequence is that the appellant has not, on the evidence, made out the case advanced in the statement of claim. The trial judge came to the same conclusion although he reached it by a different route, commencing with a misunderstanding of the nature of the appellant's case.

143 It is apparent from para. 9 of his reasons that the trial judge thought that the appellant's case against Montreal Trust was based upon the separate agreement whereas it was not. The claim was made entirely upon the pension plan and the proposition that Montreal Trust was the trustee of the pension plan. There is no mention of the separate agreement in the statement of claim. However, the trial judge's misapprehension about the foundation for the claim led him to analyze the separate agreement and in the process to perform the very useful function of assessing the validity of the alleged breaches of duty against the background of the specific provisions of the separate agreement.

144 The trial judge concluded that he should be guided in his analysis by a passage from the judgment of McLachlin, J. at p. 703 of Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611 and by a passage from p. 557 of the judgment of Egbert, J. in Merrill Petroleums v. Seaboard Oil (1957), 22 W.W.R. 529 (Alta. S.C.).

145 In Schmidt McLachlin, J. said:

> The primary rule in construing an agreement or defining the terms of a trust is respect for the intention of the parties or, in the case of a trust, the intention of the settlor. The task of the court is to examine the language of the documents to ascertain what, on a fair reading, the parties intended. Unless there is a legal reason preventing it, the courts will seek to give effect to that intention. The search for an answer to the problem before us must therefore focus primarily on the documents relating to the plans and the intention of the parties, if any, with respect to a surplus arising under a defined benefits plan.

146 Applying the primary construction rule from Schmidt there can be no doubt that neither the settlor nor the parties intended Montreal Trust to be trustee of the pension plan. The clear intention was that Montreal Trust would be confined to the role of fiscal agent and that is what the trial judge found Montreal Trust to be after the investment responsibilities were taken away in 1985:

> It is true that the functions of Montreal Trust from 1985 were clerical and might as easily have been carried out by a bookkeeper with a cheque writing machine as by a big trust company. (Para.26)

147 The passage from Merrill Petroleums describes the priority sequence of a trustee's duties as between those imposed by the trust instrument and those imposed by general principles of the common law:

> While it is also true that there are certain general obligations imposed by law on any trustee (e.g., the duty not to profit from the trust at the expense of the beneficiaries) the more specific obligations and duties of a trustee are set forth in the instrument creating the trust--in other words, except for those general duties im-

> posed by law on all trustees, the terms of a trust are to be found within the four corners of the trust instrument. The three-way agreement sets forth in considerable detail the right, duties and obligations of the "operator" or trustee, and the trustee is bound to follow the provisions of this agreement even though the instrument might in some instances run counter to the general law of trusteeship. In other words, the first duty of this trustee (as of all trustees) was to follow implicitly the terms of the trust instrument, and, secondly, to observe those general principles of trustee law which did not run counter to the express terms of the trust.

148 The emphasis in this excerpt is upon the duty of the trustee "to follow implicitly the terms of the trust instrument", and to observe general principles of trustee law which do not "run counter to the express terms of the trust". Although there are no provisions in the separate agreement which impose on Montreal Trust the affirmative duties alleged in the statement of claim to have been breached, some of the provisions are instructive in the sense that they tend to negative the notion of implied duties of the kind alleged because such implied duties would "run counter" to express terms in the separate agreement.

149 For example, clause FIRST and the third paragraph of clause NINTH of the separate agreement stand in stark contrast to the alleged duty to ensure that the plan was fully funded:

> FIRST: The Trustee shall receive any contributions paid to it in cash or other property acceptable to it. All contributions so received together with the income therefrom (hereinafter referred to as "the Trust Fund") shall be held, managed and administered pursuant to the terms of this Agreement. The Trustee shall not be responsible for the collection of funds required by the Plan to be paid to the Trustee.
>
> [Emphasis added] . . .
>
> The Trustee shall not be liable for the proper application of any part of the Trust Fund, if payments are made in accordance with the written directions of the Company certified to be in accordance with the terms of the Plan as herein provided, nor shall the Trustee be responsible for the adequacy of the Trust Fund to meet and discharge any and all payments and liabilities under the Plan. All persons dealing with the Trustee are released from inquiry into the decision or authority of the Trustee and from seeing to the application of any moneys, securities or other property paid or delivered to the Trustee.
> [Emphasis added]

150 And likewise Clause TWELFTH is a complete answer to the alleged breach in respect to the purchase of annuities. Montreal Trust purchased annuities as directed by Johnston Terminals. In so doing it "followed implicitly the terms of the trust instrument" in the words of Merrill Petroleums. Clause TWELFTH required it to obey Johnston Terminals instructions:

> TWELFTH: This trust and Agreement may be terminated any time by the Company and upon the termination of the trust and Agreement or upon the dissolution or liquidation of the Company the Trust Fund shall be paid out by the Trustee as directed by the Company subject to the provisions of Article THIRD hereof.

151 As for the alleged breach by way of failure to warn the trial judge was unable to find any such obligation either in law or in equity. Moreover, his findings of fact are to the effect that even if there were such a duty Montreal Trust was not sufficiently informed to be aware of the existence of circumstances which would warrant warnings about the sufficiency of the employer's funding:

> 28 Since Montreal Trust kept track of both company and employee contributions, it must be taken to have been aware of the fluctuations of the company contributions. However, I am unable to find that Montreal Trust was in a position to recognize the implications of them. First, the company was entitled to take contribution holidays under the terms of the plan. That it did so was not necessarily sinister. Secondly, the level of company contributions was not on its face significant. The object of the managers of a pension plan of this kind is to keep it in a position where its assets are sufficient to cover present and future liabilities. This is where the actuary comes in: it sets the level of employer contributions.
>
> 29 Analyzing the viability of a pension fund is an inexact exercise, involving much prediction. Short-term fluctuations in the value of the fund may be tolerable. Additionally, depending on the attrition rate among potential beneficiaries and changes in the employment structure of the company, fairly large employer contribution fluctuations may not be in themselves meaningful. Montreal Trust did not have a context in which what it knew or ought to have known was recognizably a warning signal: in particular, it was not privy to the periodic reports of the actuary.

152 It follows from the above that even on the Merrill Petroleums concept of "general principles of trustee law" the allegations of breach in the statement of claim cannot be sustained.

153 It is unfortunate that this case took a wrong turning in the court below such that the real issues seem to have gone out of focus. As pointed out earlier, the trial judge mistakenly understood the action to be based upon the separate agreement which he regarded as a collection of "exonerations" of Montreal Trust. Consequently, his judgment was not directed first to determining whether the claim had been established and then, only if necessary, considering the "exonerations". Instead he dealt primarily with the "exoneration" provisions and found against the plaintiff. That approach led the appellant to rest two of the three grounds of appeal on what the trial judge decided about the effect of what the appellant referred to as "insulating provisions" (exonerations) in the separate agreement. Only the third ground directly addressed a head of liability advanced in the statement of claim, namely, the failure to warn.

154 With respect to the duty to warn ground the appellant relied heavily upon the description of the duties of a trustee found in Fales v. Canada Permanent Trust, [1977] 2 S.C.R. 302. Obviously Fales is an important case in the continuing development of the law relating to trustees, but it is of no assistance to the appellant here. What is says applies in the circumstances of this case with full

force to the managing trustee of the pension plan, Johnston Terminals, but has no application to Montreal Trust in its limited, subsidiary, custodian trustee capacity.

155 Notwithstanding the confusion which crept into this case, the real issues became apparent on the appeal and were sufficiently and adequately canvassed. In that connection, even though not all of the trial judge's reasoning is germane, he did make valuable findings of fact and draw conclusions which were generally on point and relevant to the allegations of fault in the statement of claim. And he made the correct disposition of the case even though he arrived at the end result by an unorthodox route.

156 The burden was on the appellant in this appeal to demonstrate that he ought to have had judgment in the court below. In my opinion he has failed to discharge that burden and so the appeal must stand dismissed.

157 There is one further observation to be made and that is that nothing in these reasons is to be understood as subscribing to the personal opinions of the trial judge which he saw fit to pronounce in paras. 52 and 53 of his judgment.

GIBBS J.A.

cp/d/cmi/DRS/qlgxc

C.E.B. & P.G.R. 8179, **51 C.C.P.B. 297**

2005 CarswellOnt 7306

General Chemical Canada Ltd., Re

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GENERAL CHEMICAL CANADA LTD.

AND IN THE MATTER OF THE APPLICATION OF GENERAL CHEMICAL CANADA LTD.

HARBERT DISTRESSED INVESTMENT FUND, L.P. and HARBERT DISTRESSED INVESTMENT MASTER FUND, LTD. (Applicants) and GENERAL CHEMICAL CANADA LTD. (Respondent)

Ontario Superior Court of Justice

C. Campbell J.

Heard: November 18, 2005
Judgment: December 14, 2005
Docket: 05-CL-5712, 05-CL-6160

Counsel: Steven Weisz, Karen Park for General Chemical Canada Ltd.

Robert Staley, Lisa Knorst, Mark Laugesen for Harbert Distressed Investment Fund, L.P.

Deborah Grieve, Domenico Magisano for Ministry of the Environment

Mark Bailey for Superintendent of Financial Services

Clifton Prophet, Massimo C. Starnino for General Chemical Canada Holding Inc.

Ashley Taylor, Jessica Bookman for PricewaterhouseCoopers Inc. -- Monitor

Lewis Gottheil for CAW-Canada

Ian Wallace for Sherway Consulting (Windsor) Ltd.

John Leslie for Pollard Highway Products

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders -- Stay of petition -- Pending outcome of other proceedings

Restructuring of debtor company under Companies' Creditors Arrangement Act failed because prospective purchaser of assets on going concern basis would not assume environmental liabilities -- Debtor applied for receiving order under Bankruptcy and Insolvency Act -- Superintendent of Financial Services brought motion for stay pending determination of its priority and order for immediate payment of past pension plan contributions -- Minister of Environment brought motion to appoint interim receiver to oversee compliance with its orders prior to sale of assets or assignment in bankruptcy -- Motions dismissed -- It would be unfair to secured creditor to grant either motion -- Moving parties agreed to forgo claims in order to pursue plan of arrangement -- Moving parties knew that pressing claims then would likely prevent sale of assets -- Arrangement was pursued in good faith and considered reasonable by all parties -- Refusing relief sought did not bring bankruptcy process into disrepute.

Cases considered by C. Campbell J.:

> Graphicshoppe Ltd., Re (2005), 2005 CarswellOnt 7008 (Ont. 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]) -- followed
>
> King (Township) v. Rolex Equipment Co. (1992), 23 R.P.R. (2d) 313, 8 O.R. (3d) 457, 90 D.L.R. (4th) 442, 9 C.E.L.R. (N.S.) 1, 1992 CarswellOnt 216 (Ont. Gen. Div.) -- referred to
>
> Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315 (Alta. C.A.) -- referred to
>
> Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 1068, 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) -- followed
>
> Strathcona (County) v. PriceWaterhouseCoopers Inc. (2005), 2005 ABQB 559, 2005 CarswellAlta 1018, 13 C.B.R. (5th) 145, 256 D.L.R. (4th) 536, 12 M.P.L.R. (4th) 167, 47 Alta. L.R. (4th) 138 (Alta. Q.B.) -- referred to
>
> Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) -- distinguished

Statutes considered:

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

s. 47(1) -- referred to

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

Generally -- referred to

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

s. 101 -- referred to

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

Generally -- referred to

s. 22 -- referred to

s. 58(3) -- referred to

s. 58(4) -- referred to

MOTIONS by Superintendent of Financial Services and Minister of Environment for stay of application by company for receiving order under Bankruptcy and Insolvency Act and for appointment of receiver.

***C. Campbell J.*:**

1 Several motions were heard together, all in connection with a failed restructuring pursuant to the *Companies Creditor Arrangement Act* ("CCAA.")

2 Since the extension order under the CCAA was to expire on November 18, 2005 at midnight and any extension thereof was opposed by General Chemical Canada Ltd. ("the Company"), its major secured creditor and the prospective purchaser of assets, all motions were heard in a compacted time frame.

3 The anticipated sale of all of the assets on a going concern basis failed, since the prospective purchaser was not prepared to assume liability for environmental liabilities associated with a soda ash settling basin facility.

4 Harbert Distressed Investment Fund, L.P. and related entities ("Harbert" or "the Secured Creditor") sought a receiving order pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act.*, R.S.C. 1985 c. B-3 ("BIA") to appoint PricewaterhouseCoopers Inc. ("PWC") as interim receiver of the undertakings and property of the Company.

5 The Secured Creditor and the Company also sought an order vesting the assets in the interim receiver for the purpose of sale to it, approval for which was sought on expiration of CCAA extension on November 18, 2005.

6 The Company sought a declaration in respect of its bankruptcy to be effective November 18, 2005 on its filing on November 22, 2005.

7 The Superintendent of Financial Services ("the Superintendent") sought to impose restraint on the Company

making an assignment in bankruptcy until determination of the trust status of unpaid pension plan contributions. The relief sought by the Superintendent was supported by the Canadian Auto Workers Union ("CAW-Canada") and opposed by the Company and the Secured Creditor.

8 The Ministry of the Environment ("MOE") sought the appointment of a receiver, the purpose of which was to enable the Company to comply with environmental orders prior to any sale of assets or assignment under the BIA. The position taken by both the Superintendent and the MOE is supported by CAW-Canada.

9 The Superintendent and the MOE oppose the appointment of the Interim Receiver proposed by the Company, its parent General Chemical Canada Holding Inc. ("Holding"), and the Secured Creditor, being the purchaser of certain assets supported by PricewaterhouseCoopers Inc. ("PWC" or "the Monitor.")

10 The basis of the opposition is that both the Superintendent and the MOE urge determination of the respective rights of those Ministries while the Company is in CCAA and before what is expected to be an assignment in bankruptcy. In particular, the MOE seeks extension of the CCAA proceeding on the appointment of an interim receiver over all the lands and undertaking of the Company, not just those lands that are sought to be covered in the Company's application.

11 In a companion motion to its opposition, the Superintendent sought payment of unremitted employer pension contributions to the Company's pensions plans.

12 At its essence, the position of the Superintendent is that notwithstanding the initial CCAA order, the Company is required to perform the duties of a pension plan administrator set out in the *Pension Benefits Act* ("PBA") and is a fiduciary in respect of plan members pursuant to s. 22 of the PBA.

13 The Initial CCAA Order granted by Farley J. on January 19, 2005 provided for a stay of proceedings but in doing so, specifically permitted the Company to make pension plan payments.

14 The Company responded to a request for information from the Office of the Superintendent that in accordance with its financial projections, the Company simply did not "have the financial resources to make special payments under the plan."

15 The Company took the position that "the Initial Order provides for current service costs of continuing employees to be paid, thus responding to the concern that accruing benefits of active employees do not prejudice the financial plans for inactive employees."

16 The following paragraphs from the Superintendent's factum set out its state of knowledge:

> 18. Based on this exchange of correspondence, FSCO [Superintendent] staff understood that the Applicant's assessment of its financial position in January 2005 indicated that there were insufficient assets available to make special payments to the pension plans. FSCO [Superintendent] staff also understood that current service contributions for the employees who continued employment after January 14, 2005 (the "retained employees") were being made to the funds for the pension plans.
>
> 19. FSCO [Superintendent] staff were advised by representatives of the Applicant at various points during the *CCAA* restructuring process that efforts were being made to market the assets of the Applicant with a view to completing a sale of all or part of the Applicant's assets on a going concern basis. The Superintendent was

> also advised that no decisions in respect of the pension plans would be made until the bids submitted by prospective purchasers were assessed and there were discussions with the CAW. In fact, the Applicant entered into a conditional Asset Purchase Agreement on July 7, 2005.

17 The Superintendent had understood that current service (as opposed to past unpaid) contributions would be made. While funds had been set aside, they were not paid. The Court understands they have now been made as part of this proceeding.

18 As a result of the Superintendent's understanding that the Company did not have the financial resources to make the required pension plan contribution at the time the Initial Order was granted, it did not actively pursue the remedies now sought.

19 It would now appear that the issue of current service contributions is resolved and the issue raised by the Superintendent relates only to past contributions not made. The main reason that current contributions are no longer an issue, is that unknown to the Superintendent, cash reserves increased during the time from the Initial Order.

20 The motion request on behalf of the Superintendent supports the appointment of a Receiver to enable pension contribution payments to be made prior to the assignment in bankruptcy proposed by the Company.

21 The Superintendent urges that there is no pressing requirement to have a bankruptcy prior to the payment of pension claims. More importantly, the Superintendent submits it would be unfair and inequitable to permit secured creditors to utilize the bankruptcy procedures to compound what is alleged to be the Company's breach of statutory and fiduciary duties.

22 The following paragraphs from the factum of the Superintendent set out the position of his office. Footnotes are omitted:

> [34] The amounts owing to the Pension Plans on account of the unpaid contributions are subject to a deemed trust in favour of the pension beneficiaries. Under subsection 57(3) of the *PBA*, the Applicant is deemed to hold in trust, for the benefit of the members and former members of the pension plans, an amount of money equal to the contributions due but not paid into the Pension Plans.
>
> [35] "Contributions" owing by an employer include those amounts owing on account of both current service contributions and in respect of special payments. Contributions owing by an employer accrue on a daily basis.
>
> [36] The deemed trusts provided for by subsections 57(3) and (4) give the pension claims priority over secured claims and all unsecured claims against the Applicant. Monies held in trust are not the property of the trustee and are not subject to attachment by creditors. Subsection 30(7) of the *Personal Property Security Act* ("PPSA") reinforces this by providing, that pension beneficiaries have priority over any other security interests in accounts and inventory.
>
> [37] Section 57(5) of the *PBA* provides that the Applicant in its capacity as administrator of the Pension Plans has a lien and charge on the Applicant's assets in the amount equal to the deemed trusts under subsections 57(3) and (4).

23 The Superintendent relies on the decision of Farley J. in *Toronto Dominion Bank v. Usarco Ltd.*, [1991] O.J. No.

1314 (Ont. Gen. Div.) for the proposition that the deemed trust provisions of ss. 58(3) and 58(4) of the PBA applied in that case with pension plan contributions which were to have been made were not. In that case the security interest of the bank in the situation of a failed but not proceeded with bankruptcy petition was held to be subordinate to the interest of the beneficiaries of the deemed trust, which extended to the amount owing but unpaid on pension contributions.

24 That case can be distinguished. In *Usarco*, the motion by the plan administrator was made in objection to the secured creditors' appointment of a receiver to sell and dispose of assets. The issue before this Court involves a CCAA proceeding that has been ongoing for some months. The motion before the Court is not to avoid the payment of pension obligations. In any event, the payments that have become due during the CCAA proceedings have now been paid.

25 The second decision the Superintendent seeks to distinguish is *Ivaco Inc., Re*, [2005] O.J. No. 3337 (Ont. S.C.J. [Commercial List]), where the Court considered whether or not to grant an order (requested also by the Superintendent) requiring the payment of contributions to pension plans that were maintained by debtor. Certain of the secured creditors had filed motions seeking certain relief with a view to moving the debtor towards bankruptcy. The Court in *Ivaco Inc.* refused to order the immediate payment of pension plan contributions.

26 The basis on which the Superintendent in counsel's factum seeks to factually distinguish *Ivaco Inc.* has largely disappeared with the failed CCAA process and now the request to make an assignment in bankruptcy.

27 I accept that genuine issues in law continue to exist with respect to the priority to be accorded unpaid pension issues in the course of CCAA proceedings in the face of impending bankruptcy or after an assignment in bankruptcy. The fact that leave to appeal has been granted by the Court of Appeal for Ontario in *Ivaco Inc.* attests to this problem. The recent decision of the Court of Appeal in *Graphicshoppe Ltd., Re* [2005 CarswellOnt 7008 (Ont. C.A.)] (unreported, December 5, 2005, docket C42864 and M32603) attested to the difficulties of tracing.

28 In the circumstances of this case, I have concluded that the reasoning of Farley J. in *Ivaco Inc.* is directly applicable to these facts.

29 The following factual findings support the conclusion I have reached.

> [1] There is no suggestion that the CCAA proceedings initiated at the beginning of 2005 were anything but proper and appropriate. There is no suggestion by any party, including the Superintendent, that they were initiated for an improper purpose.
>
> [2] During the course of the year, all parties, including the Superintendent, believed that it was reasonable to pursue a "going concern" realization of assets.
>
> [3] The improvement in cash flow of the Applicant was thought by it to be kept by it to support a "going concern" transaction.
>
> [4] While the Superintendent did not have details of the improvement in cash flow, it did not seek to monitor that situation and did not seek to burden any potential "going concern" transaction by imposing a term such as that now sought.
>
> [5] The proximate cause of the failure of the "going concern" sale and of the CCAA proceedings was the position of the MOE in respect of environmental liabilities. [This finding should not be taken as any

keeping in mind that s. 43(7) of the BIA may be raised at the hearing of the petition.

35 To conclude otherwise (absent improper motive on the part of the 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. The Superintendent is not for either CCAA or bankruptcy a secured creditor of which other creditors are aware.

36 On the above basis, the motion of the Superintendent to in effect restrain a voluntary assignment by limiting the authority of the Receiver and preserving the status quo is dismissed. An order setting aside current services contributions to be paid for the purposes of the Pension Plans is granted as agreed to by the Company.

Position of the MOE

37 The effect of the relief sought by the MOE is similar to that sought by the Superintendent. The MOE seeks to appoint its own receiver pursuant to s. 101 of the *Courts of Justice Act* to take effect immediately on the expiration of the CCAA proceedings.

38 The purpose of the Receivership sought by the MOE is to avoid the soda ash settling basin ("SASB") facility of the Company being "abandoned as an orphan site to be cared for remediation at the expense of the taxpayers of Ontario," a result suggested that may be inevitable if the Company is permitted to file in bankruptcy.

39 I accept the submissions on behalf of the MOE that environmental legislation comprises important public welfare statutes designed to protect the air, land and water of the Province for all members of the public. I accept that the MOE has standing to assist the Court with whom and under what circumstances a Receiver should be appointed. As I understand the position of the MOE, it is not the entity that is proposed by the Applicant that is objected to as Receiver, but rather what will be the mandate of any Receiver appointed.

40 I also accept that the state of the law at present raises (as it does in the issues raised by the Superintendent) genuine issues that involve the constitutional interplay between the provincial environmental legislation and federal bankruptcy and insolvency law.

41 Cases referred to by counsel for the MOE illustrate the unsettled state of the law. See *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577 (Alta. C.A.); *Strathcona (County) v. PriceWaterhouseCoopers Inc.*, 2005 CarswellAlta 1018 (Alta. Q.B.); *King (Township) v. Rolex Equipment Co.*, [1992] O.J. No. 810 (Ont. Gen. Div.)

42 I have concluded in the case before me for much the same reason given above, that the relief sought by the MOE should not be granted in this case. Like the Superintendent, the MOE did not intervene at an earlier time in the CCAA proceeding to insist that the Company or any prospective purchaser be obligated to comply. Presumably, the MOE knew that to do so while a "going concern" transaction was beign sought might impair it. This did turn out to be the case.

43 To now impair a sale of assets transaction that would maximize the benefit to creditors by postponing bankruptcy until environmental issues are addressed would in my view at this stage be unfair. I accept that the rights of the MOE within bankruptcy may be less than if they had been actively pursued and enforced while the Company was in CCAA. The creditor process of the CCAA was allowed to proceed on the expectation of all, including the MOE, that a workable deal could be achieved. That has not turned out to be the case.

44 I have concluded that there is no improper conduct or motive on the part of any of the parties to the CCAA process, including the MOE. To now permit in effect a pre-emptive position to the MOE by postponing bankruptcy would do a disservice to the creditors of the Company, including the principal secured creditor that participated for a legitimate purpose in a permitted restructuring process.

45 Any claim for in effect priority on the part of the MOE should in my view be dealt with in the bankruptcy rather than extraordinary relief that pre-empts the legitimate position of creditors who have proceeded in a totally legitimate fashion albeit in their own interests but with no impropriety.

46 The MOE did have during the course of the CCAA the opportunity to put forward its position, which in this situation brought about its failure. As noted above, I voice no criticism of the MOE for its position, but if it could not have successfully imposed a remedial situation during the course of CCAA it should not now be enabled to prevent an entirely legitimate result for creditors from taking place.

47 Since the concern raised by the MOE is to what the Receiver may do (which actions I have accepted), their objection to PricewaterhouseCoopers Inc. as receiver does not prevail. Like Farley J. in *Royal Oak Mines Inc., Re*, [1999] O.J. No. 1369 (Ont. Gen. Div. [Commercial List]), I find no fault with the Receiver proposed by the MOE but have concluded simply that given the history and what is to be done, PWC is to be preferred.

48 The relief sought by the MOE is therefore dismissed.

49 As a result of the decision reflected in these reasons, orders issued all dated November 18, 2005:

> 1. Pursuant to s. 47(1)a of the BIA appointing PricewaterhouseCoopers as interim receiver of certain assets of the Company pursuant to the terms of the Order signed in Court File No. 05-CL-6160.
>
> 2. Vesting certain assets in the Receiver for the purpose of sale to Harbert Distressed Investment Fun on the terms and conditions as more particularly set out in the Order signed and dated November 18, 2005 in Court File No. 05-CL-6160.
>
> 3. Declaring that the Company General Chemical Canada Ltd. has made an effective assignment in bankruptcy as of November 18, 2005 by filing at the office of the Office of the Official Receiver in London, Ontario on November 22, 2005 in accordance with the Order signed on November 18, 2005 in Court File No. 05-CL-5712.

50 It would not appear that costs in respect of these motions are appropriate. If, however, any party is of the view that costs should be awarded, they may make written submissions within two weeks and the response of any party opposing should be received within one week following.

Motions dismissed.

END OF DOCUMENT

Case Name:

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

[2007] O.J. No. 4186

37 C.B.R. (5th) 282

63 C.C.P.B. 125

161 A.C.W.S. (3d) 675

2007 CarswellOnt 7014

Court File No. 07-CL-7105

Ontario Superior Court of Justice

J.M. Spence J.

Heard: September 20 and 26, 2007.
Judgment: October 31, 2007.

(141 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from lender subject to certain terms, which terms were approved in Initial Order -- Court declined to order changes to paragraphs in Initial Order, as moving parties provided insufficient basis for their objections -- Court could not compel Collins to make "special payments" ordinarily required under statutory pension law when terms of financing did not contemplate such payments.

Insolvency law -- Receivers, managers and monitors -- Liability -- Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Court declined to alter paragraphs of Initial Order and Order approving engagement of Chief Restructuring Officer that provided limitation of liability for monitor and CRO because moving parties failed to show that Court lacked jurisdiction to make such provision -- Established practice indicated that Court did have authority to grant such protection.

Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from a lender subject to certain terms, which terms were approved in Initial Order of July 19, 2007 -- Moving parties objected to wording of certain paragraphs of Initial Order, and also sought to compel Collins to make "special payments" contemplated under statutory pension law -- HELD: Motion dismissed -- Paragraph 4 of Initial Order allowing Collins to hire further individuals was not altered, since USW provided no basis for its concern that paragraph authorized unilateral contracting out of union positions -- Paragraph 6 of Initial Order stating that Collins was "not required" to make various employee compensation payments was not altered because terms of financing that Collins obtained specifically set out what disbursements were contemplated in cash flow, and "special payments" at issue were not included -- Collins was precluded by terms of financing agreement from making any material disbursements not contemplated in cash flow approved by lender -- Even if the "not required" provision resulted in abrogation of statutory pension plan law by permitting Collins to refrain from making "special payments" ordinarily required by Pension Benefits Act, Court had jurisdiction to approve an order under CCAA which conflicted with, and overrode provincial legislation -- Further, it was a proper exercise of Court's discretion to approve provision because moving parties had opportunity to object to Court's approval of financing terms, but did not do so -- Ordering Collins to make "special payments" would constitute a collateral attack on Initial Order that approved financing because Collins had no alternative funds available and such an order would require it to use funds for a purpose which was not permitted pursuant to Initial Order -- Paragraph 11 of Initial Order allowing Collins to terminate employment arrangements as it deemed appropriate was not altered, since USW did not establish that paragraph would allow Collins to repudiate its collective agreements -- Paragraph 26 of Initial Order providing that monitor was not to be deemed to have become an employer was not altered because if monitor started to act as de facto employer, motion could be brought at that time to consider matter in context of actual fact situation, rather than in current abstract circumstances -- Paragraph 29 of Initial Order providing for limitation of monitor's liability to gross negligence or willful misconduct was not altered because Court did not agree with USW's argument that such provision was beyond Court's jurisdiction to make under CCAA -- Similar limitation of liability that was provided for Chief Restructuring Officer in paragraph 4 of Order approving engagement of CRO was not altered for the same reason, and since established practice showed that Court did have authority to grant such protection to CRO.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), s. 11(4), s. 11(6), s. 11.3, s. 11.8(1)

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, s. 69(1), s. 69(2), s. 69(12), s. 116

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 55(2)

Pension Benefits Act, General Regulation, R.R.O. 1990, Reg.909, s. 4, s. 5

Counsel:

M.E. Bailey, for the Superintendent of Financial Services (Ontario).

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

C.E. Sinclair, for the 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 and K.L. Mah, for Collins & Aikman Automotive Canada Inc.

J.E. Dacks, for JP Morgan Chase Bank NA.

C.J. Hill, for Chrysler LLC.

REASONS FOR DECISION

1 **J.M. SPENCE J.**:-- 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,

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:

...

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 at paragraph 25 (Ont. Gen. Div.), 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) 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

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
(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, ...

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

(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 (Re)*, [1998] O.J. No. 3306 (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, at p. 31 (Ont. Gen. Div.):

> 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 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
>
> para. 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].

para. 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?

para. 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.*[3] 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.

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para. 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 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.

...

para. 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.*[4] 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).

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para. 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.

para. 29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re*[5] 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.).

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para. 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*[6], 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.

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

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para. 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*[7], 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*[8], also a provincial statute.

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

Note 8: R.S.M. 1970, c. M80.

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para. 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.

para. 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.

para. 34 In *Re United Used Auto & Truck Parts Ltd.*[9], 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).

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para. 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 different matter and that will be discussed below.

para. 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

para. 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.

para. 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*[10] 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.)

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36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, 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.).

[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[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"[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:

> [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 *Re 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 dismissed a motion to exempt the applicant company from certain filing requirements 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 *Re Sulphur Corp. of Canada Ltd., 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 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:

(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 *Re Richtree Inc., 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 or-

ders 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.

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 Approval 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 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 and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27 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,
> (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).

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 *Syndicat national de l'amiante d'Asbestos inc. et al. v. Jeffrey Mine Inc.*, [2003] Q.J. No. 264, 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 *Jeffrey Mine* paragraphs 60 to 62.

86 It was submitted that the text of the *Jeffrey Mine* 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 *Jeffrey Mine* 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

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 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 at paragraph 4 (Ont. S.C.J. [Commercial List]) (affirmed (2006) 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490) 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.

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 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 *Jeffrey Mine* decision at paragraph [76].

118 The discussion in *Re Jeffrey Mine* 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 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. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123 ("*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 *T.C.T. Logistics* 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 *T.C.T. Logistics* 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.

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 *T.C.T. Logistics* 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 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] S.J. No. 313.

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.

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.

J.M. SPENCE J.

cp/e/qlaxs/qlmxt/qlhcs

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 INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

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

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

REPLY FACTUM BOOK OF AUTHORITIES OF THE MOVING PARTY UNITED STEELWORKERS

(MOTION RETURNABLE AUGUST 28, 2009)

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