THE CANADIAN BAR ASSOCIATION

14TH ANNUAL INSOLVENCY LAW CONFERENCE

2018 ANNUAL CROSS COUNTRY CHECK-UP (ONTARIO)

September 14, 2018
Vancouver, British Columbia

Miranda Spence, Partner
Aird & Berlis LLP

AIRD BERLIS

TABLE OF CONTENTS AND CASES

CCAA Monitors as Oppression Complainants 1

Ernst & Young Inc. v. Essar Global Fund Limited, 2017 ONCA 1014
Urbancorp Cumberland 2 GP Inc. (Re), 2017 ONSC 7649

The Priority of GST/HST Deemed Trusts Over Secured Creditors 5
Canada v. Callidus Capital Corporation, 2017 FCA 162

The Narrow Scope of Appeal Rights Under s. 193 of the BIA.. 8

Downing Street Financial Inc. v. Harmony Village-Sheppard Inc., 2017 ONCA 611

B&M Handelman Investments Limited v. Drotos, 2018 ONCA 581

Forced Assignments Pursuant to s. 84.1 of the BIA: All or Nothing………………………...12
Re Aeropostale Canada Corp. (Notice of Intention), 2018 ONSC 1486

An Outsider's Perspective: Comments on the Impact of Bankruptcy on the Enforcement of Family Law Orders, and an Insurer's Right of Subrogation...... ..15

Fiorito v. Wiggins, 2017 ONCA 765
Douglas v Stan Fergusson Fuels Ltd., 2018 ONCA 192

Third Strike for Ontario *Construction Lien Act* Deemed Trust in Bankruptcy…………….21
Royal Bank of Canada v. A-1 Asphalt Maintenance Ltd, unreported

Guidance on Sealing Orders………………………………………………………..............23
Romspen Investment Corp. v. Courtice Auto Wreckers Ltd., 2018 ONSC 1591

CCAA Monitors as Oppression Complainants
Miranda Spence
Aird & Berlis LLP[1]

On two consecutive days in December 2017, each of the Court of Appeal for Ontario and the Ontario Superior Court of Justice (Commercial List) released decisions addressing the circumstances in which a monitor appointed under the *Companies' Creditors Arrangement Act*[2] may advance an oppression claim. Although they reached opposite conclusions on the facts before them, both courts confirmed that, in exceptional circumstances, a monitor may be granted leave to act as an oppression complainant. The factors enumerated by Pepall J.A. and Myers J., respectively, provide important guidance as to whether a monitor-led oppression claim may be available to improve recoveries for stakeholders in a CCAA proceeding.

A. *Ernst & Young Inc. v. Essar Global Fund Limited*[3]

On March 15, 2017[4], Justice Newbould of the Ontario Superior Court (Commercial List) issued a judgment authorizing Ernst & Young Inc., in its capacity as the monitor (in such capacity, the "**Algoma Monitor**") in the CCAA restructuring proceedings of Essar Steel Algoma Inc. ("**Algoma**"), to commence an action for oppression[5] against Algoma's parent, Essar Global Fund Limited ("**Essar Global**") and certain other companies owned directly or indirectly by Essar Global (collectively, the "**Essar Group**"). The Essar Group, including Essar Global and Portco, appealed.

The Alleged Oppressive Conduct

The oppression action arose in the context of a transaction (the "**Port Transaction**") that took place in November 2014 among Algoma and Port of Algoma Inc. ("**Portco**"), both subsidiaries of Essar Global, and Essar Global itself, in which Algoma's port facilities in Sault Ste Marie (the "**Port**") were conveyed to Portco. The point of contention from the Algoma Monitor's perspective, was that the Port Transaction provided Portco with the power to veto any change in control of Algoma's business.

The Algoma Monitor Was an Appropriate Complainant

The preliminary issue for the Court of Appeal was whether the Algoma Monitor had standing to initiate an oppression action against the Essar Group.

On behalf of a unanimous Court, Pepall J.A. held both that a CCAA monitor can be a complainant in an oppression action, and that the Algoma Monitor was an appropriate complainant in this case. In so deciding, Her Honour noted that the discretion afforded to the court to determine who may

[1] Miranda Spence is a partner in the Litigation and Financial Services Groups. The author would like to thank Dillon Collett, an associate in the Litigation Group, and Lynn Tay, a summer student at Aird & Berlis LLP, for their assistance in preparing this paper.
[2] R.S.C. 1985, c. C-36 [*CCAA*].
[3] 2017 ONCA 1014 [*Essar*]. Appeal heard August 12-14, 2017; decision released December 21, 2017).
[4] *Ernst & Young Inc. v. Essar Global Fund Limited et al.*, 2017 ONSC 1366 [*Essar – Commercial List*].
[5] Pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*CBCA*].

be a complainant is broad. Further, like a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant, nor automatically entitled to that status. Accordingly, on rare occasions, and in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant.

Pepall J.A. set out the following non-exhaustive set of factors a CCAA supervising judge should consider when exercising its discretion to authorize a monitor to act as complainant:

(a) whether there is a *prima facie* case that merits an oppression action or application;

(b) whether the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(c) whether any other stakeholder is better placed to be a complainant.[6]

On the facts of this case, Pepall J.A. determined that Newbould J.'s decision to authorize the Algoma Monitor to initiate an oppression claim was justified. A *prima facie* case had been established; the Algoma Monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the Algoma Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders (namely, the pensioners, retirees, employees, and trade creditors) who were not organized as a group, and who were all similarly affected by the alleged oppressive conduct. Moreover, Pepall J.A. observed that as the CCAA supervising judge and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well-positioned to supervise all parties, including the Algoma Monitor, to ensure that no unfairness or unwarranted impartiality occurred.

B. *Urbancorp Cumberland 2 GP Inc. (Re)*[7]

This decision, released the day before *Essar,* was made in proceedings in which the Fuller Landau Group Inc. had been appointed as CCAA monitor (in such capacity, the "**Edge Monitor**") over several companies affiliated with Urbancorp. The Edge Monitor brought a motion for advice and directions as to whether payments-in-kind made by two of the debtor companies, Edge on Triangle Park Inc. and Edge Residential Inc. (together, "**Edge**"), to certain creditors of *other* Urbancorp affiliates, were oppressive.

The Alleged Oppressive Conduct

The respondent creditors (collectively, "**Cooltech**"), had provided plumbing and HVAC services to Urbancorp on several different projects, over a period of 20 years. As a result of the various services provided, Cooltech was a creditor of Edge, other Urbancorp affiliates, and Urbancorp's owner, Alan Saskin, personally.

In July and August 2015, Edge transferred to Cooltech condominium units, parking spots and storage lockers valued at $2.3 million, for the purpose of paying outstanding debts owing to

[6] *Essar* at para 123.
[7] 2017 ONSC 7649 [*Urbancorp*]. Motion heard December 13, 2017; decision released December 20, 2017.

Cooltech by other Urbancorp companies, and a debt of $500,000 owed to Cooltech by Mr. Saskin personally. In exchange, Edge received intercompany book entries and other intercompany credits from the Urbancorp affiliates whose debts it had paid.

The Edge Monitor acknowledged that the value of the goods that Cooltech received was commensurate with what it was owed. However, in light of Urbancorp commencing insolvency proceedings in late 2016, the Edge Monitor asserted that Edge had replaced assets with what became impaired loans from insolvent entities, thereby prejudicing Edge's creditors in the insolvency proceedings. The Edge Monitor asserted that this conduct was oppressive, within the meaning of the *Business Corporations Act (Ontario)*.[8]

The Edge Monitor Was Not Empowered to Bring an Oppression Proceeding

As a preliminary issue, Myers J. objected to the fact that, despite styling its motion as seeking the advice and direction of the Court, the Edge Monitor was actually seeking judgment against Cooltech. Although monitors may be empowered to bring legal proceedings on behalf of CCAA debtors in appropriate circumstances, the Edge Monitor had not sought such authorization prior to initiating the motion, in conflict with its role as "a neutral with duties to all interested parties". In considering this issue, Myers J. made note of Newbould J.'s decision referred to above, which empowered the Essar Monitor to initiate the oppression proceedings, as the appropriate procedure to be followed. Accordingly, Myers J. held that the Edge Monitor ought to have sought the Court's authorization before purporting to act on behalf of the debtor in claiming relief against a creditor.

The Monitor Did Not Qualify as a Complainant

Myers J. further determined that the Edge Monitor did not qualify to act as a complainant for the purpose of advancing an oppression claim. In so deciding, His Honour considered that, as it was a liquidating CCAA process, there was no restructuring purpose that could be served by the Edge Monitor initiating the claim. Further, there was no explanation as to why the Edge Monitor was better placed to initiate the proceeding than the creditors who stood to gain from it. In summary, Myers J. stated, "I am not convinced of the utility of empowering the Monitor to drop its cloak of neutrality to bring what are really inter-creditor proceedings or that doing so facilitates this restructuring process".[9]

The Evidence Did Not Satisfy the Oppression Remedy Requirements

Finally, Myers J. held that the evidence presented did not support an oppression claim. An oppression claim requires the complainant to show that there were subjective expectations, that were relied on, and that the expectations were objectively reasonable. The Edge Monitor failed to present evidence as to what Edge's creditors in July and August 2015 may have known or expected, or any facts upon which the Court could assess whether any such expectation was reasonable. Without such evidence, the Edge Monitor was "unsuited to act for creditors in this case".[10]

---

[8] R.S.O. 1990, c. B.6 [OBCA].
[9] *Cooltech* at para 22.
[10] *Cooltech* at para 25.

C. Conclusion

In order to assert an oppression claim, a CCAA monitor must in effect "take sides", in a manner that may conflict with its traditional, impartial role. Accordingly, before authorizing a monitor to take such steps, the court must be satisfied that it is truly in the interests of the relevant stakeholders to do so.

The factors enumerated by Pepall J.A., which were also present in Myers J.'s decision, are aimed at allowing the court to find the appropriate balance. By permitting a CCAA monitor to act as a complainant in only narrow circumstances, the courts will encourage creditors who are well-positioned to do so to take on such disputes on their own behalves, thereby permitting the monitor to maintain its neutrality. At the same time, they have expanded the toolbox available to the monitor, by creating a new mechanism to overcome roadblocks where the progress of the restructuring is at stake.

The Priority of GST/HST Deemed Trusts Over Secured Creditors
Miranda Spence
Aird & Berlis LLP[11]

In one of the most talked-about decisions of 2017,[12] the Federal Court of Appeal considered whether a tax debtor's bankruptcy, combined with s. 222(1.1) of the *Excise Tax Act,*[13] renders the deemed trust provisions of s. 222 of the ETA ineffective against a secured creditor who received, prior to bankruptcy, proceeds from the assets of the tax debtor that were deemed to be held in trust for CRA.

To the surprise of many insolvency practitioners, Rennie J.A., on behalf of a divided panel, answered this question in the negative. The Court concluded that secured creditors who receive payments from a debtor in the face of the debtor owing outstanding amounts to CRA for GST/HST, must remit such proceeds to CRA up to the amount of the GST/HST obligation, even if the debtor subsequently goes bankrupt. A secured creditor who fails to do so is personally liable to CRA, which has a separate cause of action against it.

Facts

On September 22, 2004, Cheese Factory Road Holdings Inc. ("**Cheese Factory**") obtained a credit facility from the Bank of Montreal ("**BMO**"). As of December 2, 2011, Cheese Factory was in default of various obligations it owed to BMO. On December 2, 2011, BMO assigned all its rights, title and interest in and to Cheese Factory's indebtedness to Callidus Capital Corp. ("**Callidus**"). Callidus took security from Cheese Factory in respect of the indebtedness.

On or about April 2, 2012, CRA wrote to Callidus to claim the sum of $90,844.33 in respect of unpaid GST/HST, on the basis of the deemed trust mechanism of the ETA.

Three days later, on or about April 5, 2012, Cheese Factory sold a piece of real property that it owned, and paid most of the proceeds thereof to Callidus. Callidus applied those proceeds to Cheese Factory's outstanding indebtedness.

On November 7, 2013, at Callidus's request, Cheese Factory made an assignment into bankruptcy. The CRA subsequently commenced an action against Callidus for payment of the sum of $177,299.70, plus interest, representing GST/HST that Cheese Factory had failed to remit during the period October 1, 2010, until January 31, 2013.

Relevant Provisions of the ETA

Section 222(1) of the ETA creates a deemed trust in favour of the Crown in respect of any amounts collected as GST/HST, but not yet remitted to the Crown. This deemed trust has priority over any secured creditors.

---

[11] Miranda Spence is a partner in the Litigation and Financial Services Groups. The author would like to thank Damian Lu, a summer student at Aird & Berlis LLP, for his assistance in preparing this paper.
[12] *Canada v. Callidus Capital Corporation*, 2017 FCA 162 [*Callidus Capital*]
[13] R.S.C. 1985, c. E-15 [ETA].

Section 222(3) of the ETA provides that the deemed trust extends to all property of the tax debtor held by the debtor or a secured creditor, up to the amount of the GST/HST obligation. Such amounts are required to be paid to the Crown in priority to all security interests.

Section 222(1.1) of the ETA provides that s. 222(1) does not apply at or at any time after the tax debtor becomes bankrupt, to amounts that, before that time, were collected or became collectible as GST/HST.

Federal Court Decision

The Federal Court held that the deemed trust and accompanying priority are extinguished upon the bankruptcy of the debtor pursuant to s. 222(1.1) of the ETA. As a result, CRA became an unsecured creditor with regard to the unremitted amounts, and Callidus had no obligation to pay the GST/HST amount to CRA. Citing *Century Services Inc. v. Canada (AG),*[14] the Federal Court held that this interpretation "aligns with Parliament's intent to move away from asserting priority for Crown claims in insolvency law."

The Federal Court of Appeal Decision

A majority of the Federal Court of Appeal allowed the appeal, holding that, while s. 222(1.1) releases the tax debtor's assets from the deemed trust upon bankruptcy, the subsection does not extinguish the personal liability of a secured party who received proceeds from the deemed trust prior to the bankruptcy. That personal liability is a pre-existing obligation that is not affected by s. 222(1.1).

In reaching his decision, Rennie J.A. made the following remarks:

(a) s. 222(3) operates to deem all of a tax debtor's property to be held in trust for the benefit of CRA where GST/HST is collected but not remitted;

(b) it is undisputed that s. 222(1.1) renders the deemed trust ineffective with respect to the property of the tax debtor at the time of the bankruptcy;[15]

(c) the question to be answered is whether s. 222(1.1) renders the deemed trust ineffective against the proceeds from the sale of property subject to a deemed trust. As a result of the intervening sale, such proceeds are not property of the tax debtor, and therefore are not directly subject to the deemed trust established by s. 222(1). Pursuant to s. 222(3), however, secured creditors who receive such proceeds have an obligation to pay them to CRA;

(d) *Canada (Procureure generale) c. Banque Nationale du Canada*,[16] is dispositive of the issue. *Banque* dealt with the amended trust provisions of the *Income Tax Act*, which Rennie J.A. held were "near-identical" to the ETA provisions. In *Banque*, the FCA ruled that the Crown has absolute priority over proceeds from property

[14] 2010 SCC 60 [*Century Services*].
[15] *First Vancouver Finance v Minister of National Revenue*, 2002 SCC 49.
[16] 2004 FCA 92 [*Banque*]

subject to a deemed trust. The secured party who fails to comply with this obligation is personally liable, which liability is enforceable in a separate cause of action; and

(e) the lower court's interpretation "effectively defeats the purpose of the addition of subsection 222(3) and would create perverse incentives on the part of the secured creditors to not abide by the deemed trust." It would also allow the secured creditor to benefit from the debtor's failure to remit.

Taking these factors into account, Rennie J.A. concluded that s. 222(1.1) does not extinguish a secured creditor's liability to CRA for amounts received pre-bankruptcy, which liability is established by s. 222(3) of the ETA. To find otherwise would render s. 222(3) meaningless, and would allow secured creditors to manipulate both pre- and post-bankruptcy priority, creating perverse incentives on the part of secured creditors to not abide by the deemed trust.

The Dissenting Reasons of Pelletier J.A.

Pelletier J.A. held that the event which gives rise to the deemed trust provision under subsection 222(3) is not the failure to remit the amounts collected, as is the case in subsection 222(1). It is rather the *failure to remit the amount deemed by subsection 222(1) to be held in trust* for the Crown. If no amounts are deemed to be held in trust, no subsection 222(3) trust arises. Since the amounts deemed to be held in trust were extinguished upon Cheese Factory's bankruptcy, there was no liability on the part of Callidus to pay the Crown.

Appeal to the Supreme Court of Canada

Callidus sought leave to appeal to the Supreme Court of Canada, which leave was granted on March 22, 2018. The appeal hearing is currently scheduled for November 8, 2018. Each of the Insolvency Institute of Canada, the Canadian Association of Insolvency and Restructuring Professionals, and the Canadian Bankers' Association, has been granted leave to intervene.

The Narrow Scope of Appeal Rights Under s. 193 of the BIA
Miranda Spence
Aird & Berlis LLP[17]

Section 193 of the *Bankruptcy and Insolvency Act*[18] governs appeals to the Court of Appeal from orders made under that statute, prescribing four particular circumstances in which an automatic right of appeal will apply (ss. 193(a)-(d)), together with a general provision that an appeal may proceed by leave of a judge of the Court of Appeal (s. 193(e)). In two recent cases, the Court of Appeal for Ontario considered and provided additional guidance on the scope of subsections 193(b)[19], (c)[20] and (e)[21] of the BIA.

These decisions maintain the approach of the existence jurisprudence, which is to narrowly construe the specifically-enumerated categories for appeals as of right. The stated purpose of such narrow interpretation is regulatory harmony with the *Companies Creditors Arrangement Act*[22], as section 13 of that statute imposes a leave requirement for all appeals from orders made thereunder.[23]

A. *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*[24]

This appeal arose in the receivership of Harmony Village-Sheppard LP (the "**Debtor**"), a specific-purpose corporation formed to develop certain real estate in Toronto (the "**Property**") as a residential condominium project. At the time of the receiver's appointment, the Debtor had pre-sold 223 units in the project to various purchasers (the "**Unit Purchasers**"), but construction had not yet begun.

Rosen Goldberg Inc., as receiver of the Debtor (the "**Receiver**"), conducted a court-approved sale process which culminated in the sale of the Property to Pinnacle International One Lands Inc. ("**Pinnacle**"). The sale was subject to court approval, which was granted by way of an order dated June 19, 2017 (the "**Approval Order**").

The Appeal

Fortress Shepard (2016) Inc., Fortress Real Developments and Derek Sorrenti (collectively, "**Fortress**"), a competing bidder in the sale process, filed a notice of appeal on June 21, 2017, nine days before the anticipated closing date of June 30, 2017, in which it asserted an automatic right of appeal pursuant to s. 193(c) of the BIA. In addition to making a bid in the sale process, which

[17] Miranda Spence is a partner in the Litigation and Financial Services Groups. The author would like to thank Jasmine Chung, a summer student at Aird & Berlis LLP, for her assistance in preparing this paper.
[18] R.S.C., 1985, c. B-3 [*BIA*].
[19] 193(b) if the order or decision under appeal is likely to affect other cases of a similar nature in the bankruptcy proceedings;
[20] 193(c) if the property involved in the appeal exceeds in value ten thousand dollars;
[21] 193(e) in any other case by leave of a judge of the Court of Appeal.
[22] R.S.C. 1985, c. C-36 [*CCAA*]
[23] *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 [*Bending Lake*] at paras. 50-53.
[24] 2017 ONCA 611 [*Downing Street*].

was not accepted, Fortress had made a late bid that it asserted was better than Pinnacle's accepted bid.

In light of the impending closing date, the Receiver brought a motion before a single judge of the Court of Appeal, to quash the appeal on the basis that it fell outside the scope of s. 193(c). The motion focused in large part on Brown J.A.'s 2016 decision in *Bending Lake*, in which he identified three kinds of order from which s. 193(c) would *not* grant a right to appeal: (i) orders that are procedural in nature; (ii) orders that do not bring into play the value of the debtor's property; and (iii) orders that do not result in a loss. At issue on this motion was the third category. Fortress argued that, because its late bid contained a nominal purchase price that was more than $10,000 higher than the nominal purchase price set out in Pinnacle's offer, the Approval Order resulted in a loss to the Debtor's estate of more than $10,000.

No Automatic Right of Appeal Pursuant to s. 193(b)

Tulloch J.A. held that the assessment of competing offers in a sale process must involve more than a mere comparison of formal prices. Accordingly, he considered and compared additional features of each of the Pinnacle and Fortress offers, including the amount of the deposit, the financing structure, and whether or not the existing Unit Purchasers' contracts would be honoured. He also considered that the secured creditor had supported Pinnacle's bid, and the fact that, aside from Fortress and Pinnacle, there were no other serious bidders.

Based on his assessment of these factors, Tulloch J.A. concluded that Fortress had not made out an arguable case that the Receiver could not have obtained a better deal than Pinnacle's. There was therefore no appeal as of right pursuant to s. 193(c), because the Approval Order did not "result in a loss or gain" in the relevant sense.

In obiter, Tulloch J.A. also considered whether leave to appeal ought to be granted pursuant to s. 193(c). He concluded that such leave ought not be granted, primarily on the basis that the appeal was not *prima facie* meritorious, because the motions judge had appropriately applied the relevant criteria in issuing the Approval Order.

Notably, the Court of Appeal did not address whether a competing bidder whose bid was inarguably $10,000 higher than the winning bid (for example, identical terms but for the purchase price), but who did not adhere to the terms of the receiver's sale process (for example, by bidding late), would have an automatic right of appeal. Aside from creating disharmony between the BIA and CCAA appeal regimes, such an automatic right of appeal would arguably "unduly hinder the progress of insolvency proceedings",[25] and could collaterally have a detrimental impact on the "efficacy and integrity"[26] of receivers' sale processes. The trend in the case law towards narrow interpretations of ss. 193(a) through (d), together with the impact that such an automatic right of appeal would have on receivers' sales generally, suggests that the court is unlikely to be sympathetic to such an appellant.

[25] This is one of the factors the Court of Appeal must consider in deciding whether to grant leave to appeal pursuant to s. 193(e) of the BIA: see para. 38 of *Downing Street*.
[26] This is one of the factors to be considered under the *Soundair* test for judicial review of a receiver's sale of property: see para. 40 of *Downing Street*.

B. *B&M Handelman Investments Limited v. Drotos*[27]

This appeal arose in the receivership of Christine Drotos ("**Drotos**"), an individual whose primary asset was a piece of residential real estate (the "**Birchmount Property**"). The Birchmount Property is a partially constructed home located in the Scarborough Bluffs neighbourhood. It was vacant and unfit for occupancy at all material times.

Rosen Goldberg Inc., as receiver (the "**Receiver**"), had conducted a sale process pursuant to which it sold the Birchmount Property, subject to court approval. On June 1, 2018, Dunphy J. of the Ontario Superior Court (Commercial List) issued an order approving the sale (the "**Approval Order**"), after having considered the *Soundair* factors. The closing was originally scheduled for June 11, 2018, and postponed to June 14, 2018.

The Appeal

World Finance Corporation ("**WFC**"), the holder of 69.9% of the third mortgage on the Birchmount Property, had unsuccessfully opposed the Approval Order, on the grounds that the Receiver had failed to consult WFC regarding the sale and marketing process, and that the list price undervalued the Birchmount Property. On June 7, 2018, WFC filed a notice of appeal from the Approval Order. WFC asserted that its appeal was as of right pursuant to s. 193(b) of the BIA and, alternatively, sought leave to appeal pursuant to s. 193(e).

In light of the short closing date, the Receiver immediately brought a motion seeking directions regarding the appeal. The Receiver sought an order that there was no automatic right of appeal pursuant to s. 193(b), and that leave to appeal should not be granted under s. 193(e), such that the sale should be permitted to close as scheduled.

No Automatic Right of Appeal Pursuant to s. 193(b)

WFC asserted that s. 193(b) applied, because the Approval Order had been granted in a hearing at which Dunphy J. had considered and approved of four real property sales in the related receivership of Comfort Capital Inc. ("**Comfort Capital**"). Although the two proceedings were not formally consolidated, WFC asserted that its appeal could affect other cases of a similar nature relating to the approval and vesting orders made in the Comfort Capital proceeding. Because Dunphy J. had issued one set of reasons for both proceedings, and they each raised the same course of conduct by the Receiver, WFC contended that it could be met with an issue estoppel argument if it raised the same issues in subsequent proceedings to approve vesting orders on other properties in the Comfort Capital proceeding.

Like Tulloch J.A. above, Paciocco J.A. referred to Brown J.A.'s decision in *Bending Lake*, for the proposition that the rights to appeal set out in ss. 193(a) to (d) of the BIA should be interpreted narrowly, for the purpose of avoiding disharmony with the CCAA.

Bending Lake also affirmed that s. 193(b) applies only where there is a real dispute that is likely to affect another case in the *same* bankruptcy proceedings. Paciocco J.A. held that the fact that

[27] 2018 ONCA 581 [*B&M Handleman*]. The author acted for the purchaser on this motion.

the outcome of the proposed appeal could affect cases arising out of the Comfort Capital proceeding (i.e. a separate proceeding) was insufficient to give rise to an appeal as of right.

Leave to Appeal Was Denied

Paciocco J.A. referred to the applicable test, which provides that, in order to be granted leave pursuant to s. 193(e), the proposed appeal must:

(a) raise an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administrative of justice as a whole, and is one that the court should therefore consider and address;

(b) be *prima facie* meritorious; and

(c) not unduly hinder the progress of the bankruptcy/insolvency proceedings.

WFC asserted that Dunphy J. had erred in law in finding that: (i) the Receiver had considered WFC's interests, because His Honour assumed that all parties had the same interest, namely, obtaining a higher sale price; and (ii) the process was fair, because His Honour considered irrelevant or improper explanations for the Receiver's failure to consult with WFC about the marketing process and listing price.

Paciocco J.A. found that these proposed grounds of appeal lacked *prima facie* merit. First, he held that it was appropriate for Dunphy J. to have concluded that the Receiver had considered the shared interest of all of the parties in seeking the highest and best price reasonably available. Second, he found that the Receiver had discretion under the Appointment Order to proceed as it did. WFC did not present "any authority for the proposition that a receiver has a positive obligation to consult with subsequent mortgagees as to a particular sales process and the listing price."[28] He further found that "even if a general duty to consult applied in this case, Dunphy J. was clearly entitled to come to the decision he did, for the reasons he expressed."[29] Dunphy J.'s consideration of the confusion of the secured creditors' true identities, fraud allegations, and the fact that some creditors demonstrated low interest in shaping the marketing process, were not irrelevant or improper considerations. Third, Paciocco J.A. accepted the Receiver's submission that WFC would still receive nothing even if the Birchmount Property sold for the higher list price WFC proposed.

Though not required to complete the analysis, Paciocco J.A. further stated that, even if the appeal had *prima facie* merit, he would deny leave to appeal because the appeal did not does not raise an issue of general importance, because it is a fact-specific dispute, and because granting leave would unduly hinder the bankruptcy proceeding by delaying the closing, thereby adding costs or resulting in the loss of the transaction.

[28] Ibid. at para 39.
[29] Ibid. at para 41.

Forced Assignments Pursuant to s. 84.1 of the BIA: All or Nothing

Miranda Spence
Aird & Berlis LLP[30]

Section 84.1 of the *Bankruptcy and Insolvency Act*[31] permits a trustee in bankruptcy[32] to assign a bankrupt's rights and obligations under an agreement to any person who is specified by the court and agrees to the assignment, subject to certain conditions and court approval. As the section was only enacted in 2009, it has been subject to limited judicial consideration to date.

In the recent case *Re Aeropostale Canada Corp. (Notice of Intention)*,[33] the Ontario Superior Court of Justice (Commercial List) (the "**Court**") had the opportunity to consider the scope of lease rights that may be assigned pursuant to s. 84.1. The Court concluded that rights that were expressed in a lease to be personal to the bankrupt tenant, were nonetheless assignable by way of a court-ordered assignment, and were in fact assigned on the facts of this case. This result is in keeping with the purpose of s. 84.1, which is to override parties' freedom of contract, in certain limited circumstances, where doing so will enhance recoveries to a bankrupt's estate.

Facts

In May 2016, Aeropostale Canada Corp. ("**Aeropostale**"), the operator of the retail chain "Aeropostale", filed a notice of intention to make a proposal under the BIA. A sales process was initiated, with court approval, to seek buyers for its various leasehold interests. Arden Holdings Inc. ("**Arden**") sought to acquire a number of Aeropostale leases through this process, including a lease at the Conestoga Mall in Waterloo, Ontario (the "**Conestoga Lease**"). The relevant sale agreement made between Aeropostale, as Vendor, and Arden, as Purchaser, applies to "all of the Vendor's right, title and interest as lessee/tenant".[34]

Prior to the motion for sale approval, Arden entered into negotiations with the landlord of the Conestoga Mall, Ivanhoe Cambridge Inc. ("**Ivanhoe**"). Although Ivanhoe was unhappy with the proposed assignment because Arden already had a store at the Conestoga Mall, and therefore would not consent to the assignment, Ivanhoe indicated that it would not oppose a forced assignment pursuant to s. 84.1 of the BIA.

Aeropostale brought a motion for approval of the sale and assignment pursuant to ss. 66(1) and 84.1 of the BIA. The motion was granted by Newbould J., without opposition from Ivanhoe, on June 28, 2016. The sale closed shortly thereafter.

Several months later, Arden discovered that the Conestoga Lease contained, in Article 21.17, a provision that entitled Aeropostale to the benefit of lower rent, under certain conditions, if an anchor tenant's premises remained vacant (the "**Co-Tenancy Provision**"). The Co-Tenancy

---

[30] Miranda Spence is a partner in the Litigation and Financial Services Groups. The author acted for Arden Holdings Inc. on the motion addressed in this paper.
[31] R.S.C., 1985, c. B-3 [*BIA*].
[32] The section applies equally to proposal trustees, in accordance with s. 66.1 of the BIA.
[33] 2018 ONSC 1486 [*Aeropostale*].
[34] Ibid at para 9.

Provision was expressed to apply, "notwithstanding anything to the contrary contained in this Lease; so long as the Tenant as Aeropostale".

Upon discovering the existence of the Co-Tenancy Provision, and confirming that the relevant anchor tenant's premises were vacant, Arden sought to exercise the right by writing to Ivanhoe. Ivanhoe responded that the Co-Tenancy Provision was personal to Aeropostale, and had not been transferred to Arden by way of the s. 84.1 assignment. Arden disagreed, and brought a motion seeking the advice and direction of the court.

The Decision

Dunphy J. concluded that the express language of the statute and the assignment order provided a complete answer to the question before him on the motion.

Section 84.1 of the BIA provides as follows:

> 84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.
>
> …
>
> (3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature.

The assignment order provided for the assignment of "all of the rights and obligations of the Vendor under the Assigned Leases".[35]

On the basis of these provisions, Dunphy J. held that Arden had acquired *all* of the rights and obligations of Aeropostale, including those that were expressed to apply only for so long as Aeropostale is a tenant.

The Co-Tenancy Provision was not "Non-Assignable By Reason of its Nature"

In reaching his conclusion, the Court considered Ivanhoe's objection that the Co-Tenancy Provision, along with five other provisions that applied only "so long as Aeropostale is tenant", were personal to Aeropostale, and therefore were non-assignable by reason of their nature pursuant to s. 84.1(3) of the BIA.

In rejecting this argument, Dunphy J. referred to the Alberta Court of Appeal's decision in *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.,*[36] in which that court adopted the following definition of rights or obligations that by their nature are non-assignable:

---

[35] Ibid at para 25.
[36] 2011 ABCA 158 [*Ford Canada*].

> Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another.[37]

While the Conestoga Lease clearly indicated the parties' contractual intent to make the Co-Tenancy Provision non-assignable, the rights and obligations set out in Article 21.17 were not by their nature personal. It is the nature of the right or obligation, and not its form, that is to be examined.

The Court noted that Parliament had chosen to compromise parties' freedom of contract by enacting s. 84.1, for the purpose of permitting a bankrupt to realize the value inherent in any contractual rights it possessed as at the date of bankruptcy. Permitting parties to contract out of this provision simply by expressing clauses in their contracts to be "personal" to the current counter-party, would undermine this purpose.

Accordingly, the Co-Tenancy Provision was not non-assignable by reason of its nature, and had indeed been assigned to Arden, along with all of the other rights set out in the Conestoga Lease.

The Objection Was Out of Time

Dunphy J. observed that, although s. 84.1 permits the assignment of a bankrupt's contractual rights over the objection of the counterparty, that right is a discretionary one that can only be exercised by the court after a hearing. In addition to the non-assignability of a right, contractual counterparties may raise other issues, such as a consideration of the fitness of the assignee.

However, any such objections must be raised before the s. 84.1(1) assignment order is made. Ivanhoe failed to raise any objection prior to the granting of the approval order, and was accordingly out of time to do so.

Conclusions

This decision provides important guidance to landlords as to how to approach the assignment of bankrupt tenants' leases. Although expressing rights in a lease as "personal" to the current tenant may protect the landlord from those rights being acquired by a voluntary assignee, they do not provide any protection against the transmission of those rights by way of a forced assignment pursuant to s. 84.1 of the BIA. Landlords must pay close attention to the terms of any lease that a bankrupt tenant may seek to assign. If the landlord would be unhappy with the proposed assignee having the benefit of *all* of the provisions of the lease, then the landlord must oppose the assignment. Alternatively, the landlord could seek to negotiate the terms of a consent assignment.

The Court did not consider whether a landlord could oppose the assignment of only certain provisions in a lease as being non-assignable by reason of their nature. This may be seen as an impermissible, Court-ordered rewriting of a contract. As the jurisprudence under s. 84.1 continues to develop, it remains to be seen whether such a result could be permitted.

[37] Ibid. at para 55.

An Outsider's Perspective:
Comments on the Impact of Bankruptcy on the Enforcement of Family Law Orders, and an Insurer's Right of Subrogation
Miranda Spence
Aird & Berlis LLP[38]

Bankruptcy-related issues will often arise in the context of proceedings whose primary focus is another area of law. These circumstances can present a variety of challenges. Lawyers who are not familiar with the BIA may struggle to apply its intricacies to the matter at hand. This difficulty can be heightened when the bankruptcy regime does not intersect neatly with the applicable area.

In two recent cases, the Court of Appeal for Ontario had the opportunity to consider the intersection between the BIA, the *Family Law Act*[39] and the *Execution Act*[40], and the intersection between the BIA and an insurer's common law and contractual rights of subrogation, respectively.

In the first case, *Fiorito v. Wiggins*[41], the Court concluded that the objectives of the BIA were such that the mother in a family law dispute could not use the BIA to shelter her registered assets from the father's enforcement efforts. In the second case, *Douglas v Stan Fergusson Fuels Ltd.*[42], the Court concluded that the insurer's failure to structure its subrogation action properly following the insured's bankruptcy, was fatal to its ability to prosecute the action.

These cases provide valuable insight into the manner in which the bankruptcies of parties (or potential parties) to litigation can affect the rights of other interested parties, and the ways in which affected parties can seek to protect their rights.

A. Can a judgment creditor execute an order against his bankrupt former spouse's RRSP's?

This case addresses a family law dispute, in which a mother and father were engaged in a lengthy battle over custody and access of their three daughters. Following two years of custody and access litigation, the parties entered into minutes of settlement whereby the mother had custody with substantial access granted to the father. The mother did not comply with the access provisions of the agreed settlement. As a result, the father brought a contempt motion, which was heard together with a custody and access trial, over 22 days in 2011.

The Father Obtains an Order Against the Mother

At trial, the mother was found to be in contempt and sentenced to six months' probation. The children initially remained with the mother, subject to a review in six months' time. At that review, custody was transferred to the father. As a result of his success at trial, the father was initially

[38] Miranda Spence is a partner in the Litigation and Financial Services Groups. The author would like to thank Brandon Carter and Jonathan Yantzi, students-at-law at Aird & Berlis LLP, for their assistance in preparing this paper.
[39] R.S.O. 1990, c. F.3 [*FLA*].
[40] R.S.O. 1990, c. E.24 [*Execution Act*].
[41] 2017 ONCA 765 [*Fiorito*].
[42] 2018 ONCA 192 [*Douglas*].

awarded $400,000 in costs, which award was subsequently reduced by the Court of Appeal to $200,000.

The Mother Files for Bankruptcy

The mother filed for bankruptcy on February 22, 2016, without having paid the costs award. Aside from a fully-mortgaged home valued at $275,000, the mother's major assets were her RRSP's, valued at $295,600. As RRSP's are not exempt from enforcement under the *Execution Act*, but are exempt assets in bankruptcy, the effect of the mother's filing was to put her RRSP's out of the father's reach. This result appeared particularly offensive given that the father had brought a motion on January 22, 2016, one month before the filing, seeking orders that would ensure payment of the costs award. In response, the mother swore an affidavit stating that she intended to pay the costs award, and that she would not file for bankruptcy to thwart the father's claim.

The Father Obtains an Order Lifting the Stay

The father brought a motion for an order annulling the bankruptcy, or alternatively, lifting the stay under s. 69.4 of the BIA and authorizing him to continue enforcing his costs award against the mother's registered assets. On September 23, 2016, the motion judge granted the father's motion, lifting the stay to permit him to enforce his costs award. The mother appealed to the Court of Appeal.

The Court of Appeal Confirms that Lifting the Stay is Equitable and Accords with the Objectives of Bankruptcy Law

In dismissing the appeal on behalf of a unanimous court, Feldman J.A. addressed three issues:

(a) whether the motion judge err in law by lifting the stay under s. 69.4 of the BIA in order to allow the enforcement of a family law costs award;

(b) whether the motion judge err in law by misapprehending the meaning of "prejudice" and of "equitable" under s. 69.4 of the BIA;[43] and

(c) whether the motion judge misapprehended the evidence regarding whether the father would receive any payment towards his costs award in the bankruptcy.

On the first issue, the Court did not accept the mother's argument that the effect of the lift-stay order would give the father a proprietary interest in her assets, effectively expanding the court's power under s. 9(1) of the *Family Law Act*.[44] Citing LeBel J. in *Schreyer v. Schreyer*[45], Feldman

---

[43] For reference, s. 69.4 of the BIA provides as follows:
69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
(b) that it is equitable on other grounds to make such a declaration.
[44] R.S.O. 1990, c. F.3.
[45] 2011 SCC 35.

J.A. outlined that maximizing returns to the family unit as a whole, not just the bankrupt, is a policy objective of bankruptcy law. The Court concluded that, where it is equitable to do so, lifting the stay and allowing the creditor spouse to realize against the bankrupt spouse's exempt assets, which are not available to other creditors in a bankruptcy, achieves this objective.

On the second issue, Feldman J.A. divided her analysis between "material prejudice" and "equitable on other grounds".

In review of "material prejudice", the Court did not accept the submission that the motion judge erred in her interpretation or application of the material prejudice requirement of the section. Citing Farley J in *Cumberland Trading Inc., Re*[46], Feldman J.A. held that material prejudice can arise from the size of the debt and the expected loss. In addition, Feldman J.A. held that section 69.4(a) of the BIA also required that the material prejudice be related to the "continued operation" of the stay. The Court concluded that the motion judge was entitled to find that the father would "in all likelihood, receive nothing" absent a lifting of the stay.

When reviewing "equitable on other grounds", the Court held that under s. 69.4 of the BIA, courts "have a wide discretion" based on the "particular facts of the particular case".[47] Feldman J.A. concluded that the motion judge was clearly entitled to take into account the circumstances regarding the background to the debt, particularly in the context where other creditors would not be affected by the order being sought. Further, making reference to factors listed in *Advocate Mines Ltd., Re*[48], in light of the history and current status of the proceedings, the court found that "logic dictates" that the claim should be allowed to proceed. Given the strong equitable grounds, lifting the stay was appropriate in this case.

On the third issue, the Court held that the motion judge's finding was reasonable based on the mother's statement of affairs. Although it would be open for any creditor to oppose the discharge of the bankrupt, there was no guarantee that any order would be made or that any funds would be available. Feldman J.A. stated that, in any event, the bankruptcy regime included the court's ability to lift the stay in favour of a particular creditor in prescribed circumstances. Citing *Ma, Re*, Feldman J.A. held that there were "sound reasons, consistent with the scheme of the [BIA], to relieve against the automatic stay".[49] The Court concluded that regardless of whether the father received nothing in the bankruptcy, the findings of material prejudice, and that it was equitable to make the declaration for a lift-stay order would be amply justified.

An application for leave to appeal was dismissed with costs by the Supreme Court of Canada.

Conclusions

The result was highly dependent on the facts of this case, including that (a) the parties were former spouses, and therefore members of the same family unit, and (b) the wife had acted poorly by

[46] [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]).
[47] Citing L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Thomson Reuters, 2016) vol. 2 at pp. 3-350, 3-400.1.
[48] [1984] O.J. No. 2330 (Ont. S.C.J.).
[49] Ma, Re (2001), 143 O.A.C. 52 (Ont. C.A.)

acting in contempt of the custody and access order, and swearing that she did not intend to file for bankruptcy, such that the equities were not on her side.

With regard to the first point, it is clear that this rationale could not apply to permit a non-spousal execution creditor to pursue a judgment debtor's RRSP assets. Accordingly, this case confirms that the courts may interpret the BIA in such a manner as to treat the execution of monetary orders as between former spouses, differently from the execution of monetary orders as between non-spouses.

B. Can an insurer assert a subrogated claim on behalf of a bankrupt insured?

On January 9, 2008, Art and Wendy Douglas suffered a loss relating to an oil spill at their home (the "**Property**"). As at the date of loss, the wife's interest in the Property had already vested in her trustee in bankruptcy, due to her previously having filed for bankruptcy. The husband subsequently filed for bankruptcy, such that his interest in the Property also vested in a trustee in bankruptcy. The issue on this appeal related to the couple's homeowner's insurance policy (the "**Policy**"), which contained a subrogation clause entitling the insurer ("**State Farm**") to assume the insureds' rights of recovery against others, and bring action in their name to enforce those rights. In light of the insureds' bankruptcies, the question was whether they retained any interest that could be assumed by State Farm, or whether such interests had vested in the trustee along with their ownership interests in the Property.

State Farm Initiates an Action in the Names of the Bankrupt Insureds

The trustee sold the Property in October 2009. After spending $800,000 to remediate the Property, which remediation was completed in November 2009, State Farm initiated an action in the Douglases' names against Stan Fergusson Fuels Ltd. ("**SFF**"), which had allegedly spilled the oil. SFF brought a motion for summary judgment dismissing the action, on the grounds that it was a nullity due to the Douglases' bankruptcies. State Farm brought a cross-motion for a variety of relief that would permit them to continue the action.

The Action is Initially Allowed to Proceed

On the underlying motion, the motions judge found in State Farm's favour. The Court concluded that State Farm's subrogation right had vested at the time that the Policy was entered into, and not as at the date of loss. The motion judge was not persuaded that the BIA trumped State Farm's subrogation rights. He noted that the trustee could not have sold the Property if State Farm had not paid for the remediation, and that it would be inequitable to disallow State Farm from prosecuting its claim. The motion judge also asserted that granting SFF's motion for summary judgment would "incorrectly emphasize form over substance."[50]

The Divisional Court Limits the Scope of the Action

SFF sought and received leave to appeal to a panel of the Divisional Court. The Divisional Court determined that, because Mrs. Douglas's rights in the Property had already vested in her trustee as at the date the Policy was entered into, she had no interest in the Property that could be conveyed

[50] *Douglas* at para 54.

to State Farm by way of subrogation. With regard to Mr. Douglas, however, the Court found that State Farm had a "vested contingent right to assume Mr. Douglas's right to recover and to bring an action", which crystallized when State Farm assumed liability for the loss on or about March 17, 2008. As Mr. Douglas had not yet assigned himself into bankruptcy on that date, he retained an interest that could be conveyed to State Farm. Accordingly, the Court held that State Farm was entitled to commence the action in Mr. Douglas's name, but not in Mrs. Douglas's name.

The Court of Appeal Dismisses the Action

SFF appealed to the Court of Appeal. Hoy J.A., on behalf of a majority of a five-judge panel, granted the appeal. In so doing, she addressed the following four issues:

(a) whether State Farm had acquired a property interest in Mr. Douglas's cause of action as at the time he made his assignment in bankruptcy, such that the cause of action did not vest in the trustee;

(b) if not, whether the subrogation clause in the Policy permitted State Farm to commence an action in the name of Mr. Douglas, an undischarged bankrupt;

(c) whether the court could make an order under either s. 38 or s. 40 of the BIA to remedy the procedural impediment to State Farm's subrogation action; and

(d) whether the court could regularize State Farm's subrogated action by substituting the name of the trustee for that of Mr. Douglas, pursuant to Rule 5.04(2) of the *Rules of Civil Procedure*.[51]

On each of these four issues, Hoy J.A. reached the following conclusions:

(a) when an insurer is subrogated to the claim of its insured, the claim nonetheless remains that of the insured. A subrogation right does not give rise to a property interest in the cause of action itself, nor does a subrogation right amount to an assignment of the cause of action. Accordingly, as at the time of his bankruptcy, the cause of action against SFF remained Mr. Douglas's property, which property vested in the trustee pursuant to s. 71 of the BIA;

(b) State Farm argued that, because a trustee acquires title to the bankrupt's assets subject to all the equities existing at the date of bankruptcy, the cause of action that vested in the trustee was subject to State Farm's subrogation right. Hoy J.A. agreed with this proposition, but held that this reality did not grant State Farm the right to commence the action in Mr. Douglas's name, as Mr. Douglas did not have the capacity to commence the action. Rather, State Farm was entitled to commence the action in the trustee's name. However, it failed to do so;

(c) neither s. 38 nor s. 40 of the BIA was available to correct the procedural impediments to State Farm's action. In both cases, the passage of the relevant limitations period barred such a result, and the naming of Mr. Douglas instead of

[51] R.R.O. 1990, Reg. 194 [*Rules*].

the trustee was not a “mistake” that could be cured by s. 21(2) of the *Limitations Act, 2002*[52]. In addition, with respect to s. 38 of the BIA, Hoy J.A. held that State Farm had not followed the procedure required by s. 38, nor was the trustee a party to the action who could assign its rights to State Farm. With respect to s. 40 of the BIA, Hoy J.A. held that an order under this section cannot provide the bankrupt with capacity to commence the claim which it does not otherwise have; and

(d) the Court could not change the plaintiff’s name from Mr. Douglas to the trustee pursuant to Rule 5.04(2) because: (i) State Farm did not request this relief on its original motion, (ii) an order under this Rule would not be “just” because the issue had not been raised previously, (iii) the irregularity that State Farm sought to correct was intentional, (iv) the delay in seeking this relief was entirely attributable to State Farm, (v) the resulting pleadings would be deficient, and would require further amendments, and (vi) State Farm is a sophisticated party.

In the result, Hoy J.A. allowed the appeal, and dismissed State Farm’s claim. Although the five-judge panel was unanimous in agreeing with Hoy J.A.’s legal analysis, Rouleau and Roberts JJ.A. held that the matter should not be dismissed, but remitted back to the Superior Court.

State Farm filed an application for leave to appeal at the Supreme Court of Canada on May 4, 2018.

Conclusions

This case provides a valuable lesson to insurers, although at a significant cost to State Farm. Where an insured is bankrupt, the insurer retains its subrogation rights, but must be sure to commence any claim in the name of the trustee, as opposed to the name of the bankrupt.

[52] S.O. 2002, c. 24, Sch. B.

Third Strike for Ontario *Construction Lien Act* Deemed Trust in Bankruptcy
Sam Babe and Miranda Spence
Aird & Berlis LLP[53]

In a January 31, 2018 decision from the bench in the matter of *Royal Bank of Canada v. A-1 Asphalt Maintenance Ltd.*[54], Conway J. of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") held that the deemed trust provisions of subsection 8(1)(a) of the *Construction Lien Act* (Ontario)[55] were not, on their own, sufficient to create a trust recognized in a contractor's bankruptcy or proposal proceedings. *A-1 Asphalt* is the third consecutive decision, after *Royal Bank of Canada v. Atlas Block Co. Limited,*[56] and *Bank of Montreal v. Kappeler Masonry Corporation, et. al.*,[57] in which the Court has upheld the priority of a *Personal Property Security Act* general security interest over CLA deemed trust claims in a *Bankruptcy and Insolvency Act*[58] proceeding.

A-1 Asphalt Maintenance Ltd. ("**A-1**") had filed a notice of intention to make a proposal under the BIA in November 2014. An interim receiver was appointed approximately two weeks later, and soon had its powers expanded to those of a full BIA section 243 receiver (collectively, the "**Receiver**"). When A-1 failed to file a proposal in December 2014, it was deemed bankrupt.

The bonding company which had paid out (and become subrogated to) twenty lien claims, argued that funds paid by customers to the Receiver were subject to true trusts due to the operation of s. 8(1)(a) of the CLA. The bonding company did not, however, advance any evidence as to the source, status or treatment of funds in the hands of customers prior to payment to the Receiver.

In *British Columbia v. Henfrey Sampson Belair Ltd.*[59], the Supreme Court of Canada had held that a trust must bear all three certainties of a common law trust in order to be recognized under s. 67(1)(a) of the BIA, and that the existence of such characteristics was (at least in part) a question of fact. Following Henfrey, Conway J. found that, by relying solely on the provisions of the CLA, the bonding company had not established certainty of subject matter, and thus had not discharged its onus to prove its claim under s. 81(3) of the BIA.

The result in *A-1 Asphalt* stands in contrast to *Iona Contractors Ltd. (Receiver of) v. Guarantee Co. of North America*,[60] where the Alberta Court of Appeal looked only to the deemed trust provisions of the Alberta *Builders' Lien Act*[61] to find a true trust recognizable under paragraph 67(1)(a) of the BIA.

In *obiter dicta*, Conway J. suggested that the Receiver's record-keeping would not, on principles laid out by the Court of Appeal for Ontario in *GMAC Commercial Credit Corp. Canada v. TCT*

[53] Sam Babe is a partner in the Financial Services Group, and Miranda Spence is a partner in the Litigation and Financial Services Groups. Sam acted for Royal Bank of Canada on this motion.
[54] Court File No. CV-14-10784-00CL [*A-1 Asphalt*].
[55] R.S.O. 1990, c. C.30 [CLA].
[56] 2014 ONSC 3062 [*Atlas Block*].
[57] 2017 ONSC 6760 [*Kappeler Masonry*].
[58] R.S.C., 1985, c. B-3 [*BIA*].
[59] [1989] 2 S.C.R. 24 [*Henfrey*].
[60] 2015 ABCA 240.
[61] R.S.A. 2000, c. B-7.

Logistics Inc.,[62] have been sufficient to provide certainty of subject matter, and that she did not regard *TCT* to have been overruled on the point by the Court of Appeal's subsequent decision in *Graphicshoppe Ltd., Re.*[63] This recognition of the continued authority of *TCT* also played a key role in Conway J.'s decision in *Kappeler Masonry*.

On June 30, 2018, the *Construction Act*[64] came into force in Ontario, replacing the CLA. The new CA imposes additional obligations on contractors and subcontractor to hold trust funds in separate accounts, and to maintain written records respecting the trust funds. Arguably, these obligations still fall short of the requirements necessary to establish the three certainties prescribed in *Henfrey*, and/or the record-keeping requirements established in *TCT*. It remains to be seen how the courts will view deemed trusts established under the new Act.

Conway J.'s decision in *A-1 Asphalt* has been appealed to the Court of Appeal for Ontario, with the appeal scheduled to be heard in October 2018. In light of the recent revisions to the statutory regime in Ontario, the conflicting decision from the Court of Appeal for Alberta, and the pending appeal in Ontario, this area of law is worth watching as it continues to develop.

---

[62] (2005) 7 C.B.R. (5th) 202 [*TCT*].
[63] [2005] O.J. No. 5184 [*Graphicshoppe*].
[64] R.S.O. 1990, c. C30 [CA].

Guidance on Sealing Orders
Miranda Spence
Aird & Berlis LLP[65]

Despite the relatively stringent requirements for sealing orders set out by the Supreme Court of Canada in *Sierra Club*[66], such orders are often granted as a matter of course at various stages of insolvency proceedings. The courts recognize that, as such proceedings often require the court to consider and approve commercial transactions on an urgent basis, there can be a practical need to seal certain information to ensure the integrity of the process and thereby maximize value for stakeholders.

In the recent decision of the Ontario Superior Court of Justice (Commercial List) in *Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.*[67], the receiver brought a motion seeking the court's approval of its sale of certain real estate assets. Although no party opposed the motion, Dunphy J. took the opportunity to comment on what he viewed as excessive sealing of evidence, among other things. The decision provides guidance to insolvency practitioners as to what the court will consider to be an acceptable balance between the Open Court principle, and the practical needs and realities of such proceedings.

Dunphy J. made note of the practice often employed at the Commercial List with regard to commercially sensitive documents, whereby the moving party will serve on the service list redacted copies of the exhibits to be sealed, and file with the judge the un-redacted exhibits in a sealed envelope marked with warnings that they not be opened except by the judge. His Honour further noted,

> [w]hile not strictly according to the letter or spirit of the Open Court principle or the guidelines contained in *Sierra Club of Canada v. Canada (Minister of Finance)*, this practice is a reasonable way of balancing the need to give notice against the potential impracticability of getting a sealing order in advance of service of the motion material. However, where this work-around is employed, the party doing so should do so (i) only where *necessary*; and (ii) only to the *extent* necessary.[68]

In addition to these requirements, this decision confirms the following principles:

(a) the documents to be sealed must be truly commercially sensitive. Here, because the appraisals sought to be sealed were more than three years old, Dunphy J. concluded that there was no reason for them to be sealed;

(b) if not produced, the documents to be sealed must be described in sufficient detail for stakeholders to make an informed decision about their position. Parties should consider offering stakeholders the opportunity to access the information via a non-disclosure undertaking;

[65] Miranda Spence is a partner in the Litigation and Financial Services Groups.
[66] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*]
[67] 2018 ONSC 1591 [*Romspen*]
[68] *Romspen* at para 14, citation omitted.

(c) copies of the documents from which the sensitive information has been redacted ought to be served and filed; and

(d) the sealing order is to apply only for so long as necessary (in this case, until the closing of the sale or further order of the court).

In the result, Dunphy J. granted a modified form of sealing order which adhered to these principles.

Miranda Spence

T 416.865.3414
F 416.863.1515
E mspence@airdberlis.com

Aird & Berlis LLP | Lawyers
Brookfield Place, 181 Bay Street, Suite 1800
Toronto, Canada M5J 2T9 | airdberlis.com

33627723.2