Collateral Matters

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Receivers, Unions and the Lifting of the Stay: Are the Floodgates Open or Have They Merely Sprung A Leak?

By Jeremy Nemers

In what may prove either to be a landmark decision or a mere outlier confined to its unique facts, the Court of Appeal for Ontario (the "**Court of Appeal**") in *Romspen Investment Corporation v. Courtice Auto Wreckers Limited, et al.*[1] has overturned an earlier decision and lifted the stay of proceedings against a court-appointed receiver to allow a union to proceed with a certification application and an unfair labour practice complaint against the receiver. While the long-term significance of *Romspen* remains to be determined, there are some silver linings in a case that otherwise leaves a bitter taste in the mouths of receivers and the secured lenders that apply to have them appointed.

Facts

Pursuant to an Order of the Honourable Justice Penny of the Ontario Superior Court of Justice (Commercial List) (the "**Commercial List Court**") made October 19, 2015 (the "**Receivership Order**"), Rosen Goldberg Inc. was appointed as the receiver (the "**Receiver**") of several debtor corporations (the "**Debtors**"), one of which was Courtice Auto Wreckers Limited (the "**Employer**"). As is standard practice, the Receivership Order provided that no proceeding can be commenced or continued in any court or tribunal against the Receiver or any of the Debtors except with the consent of the Receiver or leave of the Commercial List Court.

After the making of the Receivership Order, and with a view to representing a bargaining unit of six of the Employer's employees, Local 793 of the International Union of Operating Engineers (the "**Union**") applied to the Ontario Labour Relations Board (the "**OLRB**") for certification (the "**Certification Application**"). Two days after the Union filed the Certification Application, the Receiver dismissed four of the six employees in the proposed bargaining unit. According to the Union, the Receiver then hired new workers to perform duties substantially similar to those performed by the dismissed employees. For its part, the Receiver denied having hired replacement workers and offered business reasons for the dismissals. Meanwhile, on the same day that the Receiver was alleged to have hired replacement workers, the OLRB stayed the Union's Certification Application on the basis that it was caught by the stay of proceedings imposed by the Receivership Order.

In response to what it perceived as anti-union animus by the Receiver, the Union filed an unfair labour practice complaint with the OLRB (the "**ULP Complaint**"); however, in light of the stay of proceedings imposed by the Receivership Order, the Union now sought leave of the Commercial List Court to proceed with both its initial Certification Application and the new ULP Complaint.

Reasons of the Commercial List Court

The Honourable Justice Wilton-Siegel of the Commercial List Court dismissed the Union's motion in its entirety (the "**Commercial List Decision**").

His Honour held that the effect of the Certification Application would be to increase the rights of the members of the proposed bargaining unit relative to the Debtors' other creditors, which would be contrary to the policy and

[1] 2017 ONCA 301 [*Romspen*].

purpose of the stay of proceedings (which, in substance, requires the rights and remedies of all creditors to be frozen in order to maintain the status quo), and that recognition of the proposed bargaining unit could have a deleterious impact on the sale of the Debtors' property by the Receiver and the proceeds realized therefrom. As there was no guarantee as to what form the sale of the Debtors' property would take, or what property would even be included in such sale, His Honour held that the Union was not being prejudiced by the stay – if a purchaser were willing to purchase the Debtors' property subject to the proposed bargaining unit, the Union could pursue the Certification Application after such sale; if no purchaser were willing to assume the Debtors' property subject to the proposed bargaining unit, the latter would not be meaningful after the sale in any event.

His Honour then held that there could be no ULP Complaint without the valid commencement of the Certification Application. Having already ruled that the stay of proceedings imposed by the Receivership Order would not be lifted to allow the Certification Application, His Honour held that the Union cannot assert that the employees were terminated in response to a Certification Application that itself is null and void.

At the Court of Appeal

All three Justices hearing the matter at the Court of Appeal agreed that the Union required leave to appeal the Commercial List Decision (which position the Union at first resisted), and all three Justices were prepared to grant such leave, with the issues raised being "*undoubtedly important to the practice of insolvency law*."[2]

However, a 2-1 split emerged on the merits of the appeal, with Justices MacPherson and Doherty prevailing and overturning the Commercial List Decision with respect to both the Certification Application and the ULP Complaint.

The Majority Decision

On behalf of the majority, Justice MacPherson held that the Commercial List Decision relied largely on speculative reasoning as to, amongst other things, the rights the proposed bargaining unit members would receive (noting "*[a] successful certification application does not guarantee employees better wages*"[3]) and there being no concrete evidence that recognition of the proposed bargaining unit would negatively impact a sale (noting "*it may also be that a set collective agreement, with its clarity of terms, would be attractive to a prospective purchaser*"[4]). On the issue of prejudice, Justice MacPherson stressed that the "*right to form and join a union of one's choosing is a fundamental right under the [provincial labour statute]*"[5] and "*[i]nterfering with employees' ability to exercise their statutory labour rights, particularly in circumstances where employees were allegedly terminated for exercising those rights, causes clear prejudice*."[6] Having decided that the stay should be lifted with respect to the Certification Application, it therefore followed that the ULP Complaint was not invalid on its face, and Justice MacPherson also decided to lift the stay with respect to the ULP Complaint.

In overturning the Commercial List Decision, Justice MacPherson relied on subsection 72(1) of the *Bankruptcy and Insolvency Act*,[7] which provides that the federal BIA "*shall not be deemed to abrogate or supersede provisions of any other law or statute relating to property and civil rights that are not in conflict with [the BIA]*,"[8] and made a passing reference to the Supreme Court of Canada's holding in *GMAC Commercial Credit Corporation-Canada v. T.C.T. Logistics Inc.*,[9] that the effect of s. 72(1) of the BIA "*is not intended to extinguish legally protected [provincial] rights unless those rights are in conflict with the [federal BIA]*."[10] Without engaging in any further analysis on the point, Justice MacPherson simply stated that "*[t]here is no such conflict here*."[11]

A recurring theme in Justice MacPherson's decision is the purported simple, straightforward and early-stage nature of the relief sought – at least with respect to this particular Certification Application and this particular ULP Complaint.

The Dissent

In contrast, and noting that the effort to certify a union after a receiver's appointment "*represents a new front in the 'battle' [between unions] and other creditors of an insolvent business*,"[12] Justice Lauwers delivered a lengthy dissent and warned that the majority decision "*would be a critical precedent of broader application*"[13] that would "*effect a sea change in insolvency law [and] profoundly alter the economic dynamics of insolvency*."[14] Justice Lauwers would have deferred to the Commercial List Decision and the experience of its author – a "*commercial list judge with long experience in insolvency*"[15] – who was not prepared to "*contradict bedrock insolvency principles*"[16] based on the factual context of this case.

Noting that GMAC is not the latest word from the Supreme Court on paramountcy between federal and provincial legislation, Justice Lauwers cited more recent jurisprudence[17] that finds a conflict between two statutory

[2] *Romspen, supra* at para. 56.
[3] *Romspen, supra* at para. 32.
[4] *Romspen, supra* at para. 34.
[5] *Romspen, supra* at para. 37.
[6] *Romspen, supra* at para. 37.
[7] R.S.C. 1985, c. B-3 [BIA].
[8] BIA, *supra*, s. 72(1).
[9] 2006 SCC 35, [2006] 2 S.C.R. 123 [*GMAC*].
[10] *GMAC, supra* at para. 47.
[11] *Romspen, supra* at para. 47.
[12] *Romspen, supra* at para. 65.
[13] *Romspen, supra* at para. 65.
[14] *Romspen, supra* at para. 93.
[15] *Romspen, supra* at para. 84.
[16] Romspen, supra at para. 121.
[17] *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 S.C.R. 397.

regimes even if it is possible to comply with both regimes but the operation of the provincial law would frustrate the purpose of the federal enactment. Given one of the primary purposes of federal insolvency law is to preserve the *status quo* during the insolvency proceedings, Justice Lauwers held that "*the policy contest presented in [the case at bar] is precisely the kind of conflict between provincial regulatory regime for labour relations and the federal insolvency regime that the paramountcy doctrine is intended to recognize and accommodate*."[18]

At a practical level, Justice Lauwers also swept aside the majority's conclusion that the Commercial List Decision relied on speculative reasoning, noting that "*[i]t seems quite plain that neither the employees nor the union would be pursuing certification if it did not provide an advantage in the [receivership] process*"[19] and "*[w]hile a successful certification application does not guarantee employees better wages or working conditions, their enhanced bargaining power is surely what unionization is all about*."[20]

Implications

Only time will tell, of course, whether this case will be confined narrowly to its facts or whether the floodgates have been opened with respect to the lifting of court-ordered stays against receivers or other court-appointed officers – either in the union context or even in other contexts. (In the reasons issued by the Commercial List Court, His Honour expressly provided that, apart from receiverships, "*I do not address other insolvency proceedings in this Endorsement*").[21] The case law presently provides (and *Romspen* was supposedly decided on the premise) that the stay should only be lifted if "*sound reasons, consistent with the scheme of the [BIA], exist for relieving against the otherwise automatic stay of proceedings*."[22]

For the time being, there is certainly reason for court-appointed officers to be concerned with the majority decision of the Court of Appeal, but *Romspen* does at least offer several factual nuances that may make it easy to distinguish moving forward in an effort to confine it to its facts:

- the majority decision notes (whether rightly or wrongly) that the breaking of the *status quo* in this particular case does not have the effect of automatically increasing the rights of employees as creditors (with the result instead being an employer's duty to recognize the Union and bargain with it in good faith);
- the relief granted – at least with the Certification Application – is very early-stage in nature, such that it merely entitles the Union to a representation vote, not to certification itself;
- there are only six employees in the proposed bargaining unit, which was being proposed at a specific street address (rather than a municipal-wide unit) and in respect of only one classification of employees on site;
- the majority decision describes the Receiver as not having put forward any concrete evidence that the recognition of the proposed bargaining unit would negatively impact a sale, going so far as to describe "*the Receiver's statement in its first report that it has 'serious concerns' that certification could negatively impact a sale [as] little more than self-serving speculation*;"[23]
- the Union indicated its willingness to delay bargaining a collective agreement for up to a year should the Receiver produce such evidence (although the dissent notes that this offer was conditional in certain respects); and
- as of the appeal hearing, the Receiver had been running the business for over a year with no definite end in sight.

Until such time as the long-term impact of *Romspen* is played-out in the case law, the above facts may provide a basis upon which the case can be distinguished from the factual contexts of other (perhaps more typical) mandates involving court-appointed officers.

[18] *Romspen, supra* at para. 107.
[19] *Romspen, supra* at para. 111.
[20] *Romspen, supra* at para. 111.
[21] *Romspen Investment Corporation v. Courtice Auto Wreckers*, 2016 ONSC 1808, 36 CBR (6th) 141 at para. 41 [*Commercial List Court Decision*].
[22] *Commercial List Court Decision*, *supra* at para. 18.
[23] *Romspen, supra* at para. 35.

If you have questions regarding any aspect of *Collateral Matters*, please contact any member of the Aird & Berlis LLP Financial Services Group:

Lawyers:

Ian Aversa	416.865.3082	iaversa@airdberlis.com
Sam Babe	416.865.7718	sbabe@airdberlis.com
Andrew Biderman	416.865.7719	abiderman@airdberlis.com
Sam Billard	416.865.4648	sbillard@airdberlis.com
Aaron Collins	416.865.3412	acollins@airdberlis.com
Robb English	416.865.4748	renglish@airdberlis.com
Harry M. Fogul	416.865.7773	hfogul@airdberlis.com
Jill Fraser	416.865.7744	jfraser@airdberlis.com
Alyssa Gebert	416.865.3067	agebert@airdberlis.com
Jacqueline (Jack) Goslett	416.865.4741	jgoslettf@airdberlis.com
Steven L. Graff	416.865.7726	sgraff@airdberlis.com
Sanjeev Mitra	416.865.3085	smitra@airdberlis.com
Jeremy Nemers	416.865.7724	jnemers@airdberlis.com
Kyle B. Plunkett	416.865.3406	kplunkett@airdberlis.com
Kenneth Rosenstein	416.865.3427	krosenstein@airdberlis.com
Miranda Spence	416.865.3414	mspence@airdberlis.com

AIRD & BERLIS LLP
Barristers and Solicitors

Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario, Canada
M5J 2T9
T 416.863.1500 F 416.863.1515
www.airdberlis.com

Newsletter Editor:
Jill Fraser
T 416.865.7744
E jfraser@airdberlis.com
Any of the articles or papers written by our professionals can be viewed at:
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