Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

BRIDGING FINANCE INC.,
as agent for SPROTT BRIDGING INCOME FUND LP

Applicant

and

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED

Respondent

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C43, AS AMENDED

BOOK OF AUTHORITIES OF THE RESPONDING PARTY
(on behalf of the Creditor, ROL-LAND FARMS and GREENHOUSES INC.)

September 14, 2017

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LIST OF AUTHORITIES

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St-Marys Paper Inc. (In Bankruptcy), 1994 CanLII 1232 (ON CA)

Date: 1994-07-04
Docket: c16655
Other citations: 19 OR (3d) 163; 116 DLR (4th) 448; 26 CBR (3d) 273; [1994] OJ No 1426 (QL); 73 OAC 1
Citation: St-Marys Paper Inc. (In Bankruptcy), 1994 CanLII 1232 (ON CA), <http://canlii.ca/t/6k2l>, retrieved on 2017-09-11

Re St. Marys Paper Inc.
[Indexed as: St. Marys Paper Inc. (Re)]

19 O.R. (3d) 163
[1994] O.J. No. 1426
Action No. C16655

Court of Appeal for Ontario,
Arbour, Osborne and Abella JJ.A.
July 4, 1994

* Note: An appeal from the following judgment of Ontario Court of Appeal to the Supreme Court of Canada (La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.) was dismissed on January 22, 1996. See 1996 CanLII 246 (SCC), 26 O.R. (3d) 416 and [1996] S.C.J. No. 3.

Pensions -- Liability for contribution to pension plans -- Trustee in bankruptcy rehiring employees of bankrupt -- Trustee making contributions to existing pension plans but expressly denying liability for unfunded liabilities -- Trustee in bankruptcy coming within definition of "employer" -- Trustee in bankruptcy liable for unfunded pension plan obligations -- Pension Benefits Act, R.S.O. 1990, c. P.8.

Statutes -- Interpretation -- Conflicts -- Paramountcy -- Trustee in bankruptcy becoming employer under provincial Pension Benefits Act and required to pay unfunded pension plan liabilities -- No operative conflict with distribution scheme under federal Bankruptcy and Insolvency Act -- Pension Benefits Act, R.S.O. 1990, c. P.8 -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

E & Y was the trustee in bankruptcy of M Inc., the operator of a paper mill. After the bankruptcy, E & Y went into possession of the mill to continue its operation so that M Inc. could be sold as a going concern. The bankruptcy having terminated the employment of the union and the non-union workforce, after negotiations, E & Y engaged the workers on a week-to-week basis with the same benefit package as existed before the bankruptcy. E & Y agreed to continue the union and non-union pension plans, but it expressly did not accept responsibility for any obligations of M Inc. including unfunded pension liabilities. The administrator of the pension plans, however, took the position that E & Y had become an "employer" under the Pension Benefits Act (PBA) and was liable for special payments for the unfunded liabilities. E & Y applied for a declaration that it was not liable. Its application was dismissed and it appealed.

Held, the appeal should be dismissed with costs.

Per Arbour and Osborne JJ.A.: "Employer" is defined in s. 1 of the PBA, and, from that definition, employer includes the organization from which the member of a pension plan receives remuneration or received remuneration to which the pension plan is related. Remuneration is not defined, and, by referring to the provisions of the two pension plans provided by M Inc., E & Y sought to argue that it did not provide remuneration and that it accordingly was not an employer. This approach, however, was inconsistent with the purpose and philosophy of the PBA; it was not appropriate to look to the plans to determine the status of the person from whom the workers received their wages. The proper approach was to determine first whether the members or former members of the plans received remuneration, as they clearly did here, and second whether the remuneration was related to the pension plan. In entering into the employment agreement with the workers, E & Y continued the pension plans and adopted them. The remuneration received by the workers was remuneration to which the pension plan was related. Although it undoubtedly did not intend to do so, E & Y dealt with the workers in such a way as to make itself liable for special payments for the unfunded liabilities.

Contrary to the argument of E & Y made for the first time on the appeal, this interpretation of the word employer did not offend the constitutional law principle of paramountcy. The doctrine of paramountcy has no application unless there is an unavoidable conflict between a federal and a provincial statute. E & Y's argument was that if the trustee in bankruptcy was liable for the unfunded pension liabilities, then it could charge that liability as an expense of the trustee and this would alter the priorities established under the federal Bankruptcy and Insolvency Act (BIA) by elevating a claim provable in bankruptcy to the higher priority reserved or the expenses of the trustee. There was, however, no constitutional impediment. E & Y's liability was a separate obligation of the trustee, independent of the obligation of the bankrupt, and did not operate to alter the ranking of M Inc.'s obligations under the BIA. The possibility that E & Y may have a claim against the bankrupt's estate did not elevate or alter the provable claim of the employees. There was no operational conflict between the provincial and federal statutes and no need to vary the interpretation of the word "employer".

Per Abella J.A. (dissenting): No liability is imposed by the PBA on any employer unless that employer has agreed to provide a pension plan. The payment of current service costs and related actions by a trustee in bankruptcy does not trigger all other PBA employment duties. The trustee was not an employer required to make contributions under a pension plan as contemplated by the PBA. The contrary assertion would act as a barrier to the assumption by a trustee of any pension plan continuity and would invite the automatic termination of pension plans upon bankruptcy.

APPEAL from an order of the Ontario Court (General Division) (1993), 1993 CanLII 5451 (ON SC), 15 O.R. (3d) 359, 107 D.L.R. (4th) 715 (Farley J.), determining the liability of a trustee in bankruptcy under the Pension Benefits Act, R.S.O. 1990, c. P.8, for pension plan liabilities.

Cases referred to Deloitte Haskins & Sells Ltd. v. Workers' Compensation Board, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577, 55 C.B.R. (N.S.) 241, 38 Alta. L.R. (2d) 169, [1985] 4 W.W.R. 481, 60 N.R. 81; Great Atlantic & Pacific Co. of Canada v. Vance (1994), 1994 CanLII 10530 (ON SC), 16 O.R. (3d) 316, 111 D.L.R. (4th) 328, 94 C.L.L.C. 14,010 (Div. Ct.); Rizzo and Rizzo Shoes Ltd. (Re) (1991), 1991 CanLII 7316 (ON SC), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. 14,013 (Gen. Div. Bkcy.); Salvation Army, Canada East v. Ontario (Attorney General) (1992), 1992 CanLII 8622 (ON SC), 40 C.C.E.L. 130, 92 D.T.C. 238 (Ont. Gen. Div.) Statutes referred to Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 14.06(2) [enacted 1992, c. 27, s. 8], 30(1)(c), 31(4), 32, 136(1)(b)(i), 141 Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1 "employer", 3, 5, 6, 8, 9, 10, 13, 14, 18, 19, 55(1), (2)(a), 57, 69(2), 71(1), 75 Rules and regulations referred to R.R.O. 1990, Reg. 909 (Pension Benefits Act), ss. 4(1), (2) [rep. & sub. O. Reg. 712/92, s. 3(1)], 5(1)(b) [rep. & sub. idem, s. 4] Authorities referred to Houlden and Morawitz, "Trustee Protecting Himself Against Liability for Debts and Liabilities Incurred in Carrying on the Business of the Bankrupt", Bankruptcy and Insolvency Law of Canada, 3rd ed., vol. 1 (Toronto: Carswell, 1992), pp. 103-04

Lyndon A. Barnes and Gordon Marantz, for appellant, trustee in bankruptcy, Ernst & Young.

Robert W. Staley and Edward W. Purdy, for respondent, Price Waterhouse Ltd., Administrator of the Pension Plan for Participating Unions of St. Marys Paper Inc. and the Pension Plan for Non-union employees of St. Marys Paper Inc.

Ian G. Scott, Q.C., Martha Milezynski and Clifton P. Prophet, for respondent employees and the Communications, Energy and Paperworkers Union of Canada and Locals 47-0, 67, 69 and 133.

Richard Stewart, for intervenor, Attorney General of Ontario.

ARBOUR AND OSBORNE JJ.A.: -- This is an appeal by Ernst & Young Inc., the trustee in bankruptcy of St. Marys Paper Inc. (St. Marys), from the order of Farley J. dated September 29, 1993 [1993 CanLII 5451 (ON SC), 15 O.R. (3d) 359, 107 D.L.R. (4th) 715], made on the appellant's motion for directions. In its motion, the appellant sought a declaration that it was not liable for any pension obligations under St. Marys' union and non-union pension plans.

Farley J. found that the appellant had made itself the "employer" of St. Marys union and non-union employees, for the purpose of assessing its obligations under the Pension Benefits Act, R.S.O. 1990, c. P.8 (PBA). In his reasons, he concluded that the appellant was obligated, by the PBA, to make the "special payments" required to be made by the employer because of the existence of unfunded liabilities in both St. Marys union and non-union pension plans.

This appeal requires consideration of the appellant's status and consequent obligations under the PBA, that is whether, in the circumstances of its dealings with St. Marys workers, the appellant, trustee in bankruptcy, became the "employer" of the workers for PBA purposes. If it did become a PBA "employer", as Farley J. found it did, a further issue arises whether, as a statutory "employer", the appellant is required by the provisions of the PBA to make the special payments sought by the respondent Price Waterhouse, the administrator of St. Marys union and non-union pension plans. The resolution of the issue of the appellant's status under the PBA is to a large measure a matter of statutory interpretation, central to which is the meaning to be given to the words "employer" and "remuneration" in the regulatory scheme established for pensions in Ontario by the PBA.

The appellant raised a further issue in this court which it did not argue on the motion for directions. It submits that Farley J.'s interpretation of the definition of "employer" in the PBA and his application of that definition to the facts results in an impermissible, but avoidable, conflict between an Ontario statute (the PBA) and a federal statute (the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (BIA)). The appellant contends that Farley J.'s interpretation of the PBA definition of "employer" and his conclusion as to the appellant's obligations as an "employer" interfere with the scheme of distribution contemplated by s. 136 of the BIA, a federal and paramount statute. This latter issue arises because the appellant undertook the employment of the workers in its capacity as St. Marys' trustee in bankruptcy.

The appellant submits that the relevant provisions of the PBA can reasonably be interpreted, and therefore should be interpreted, in a way which would avoid this conflict. The appellant does not seek a declaration that any part of the PBA is unconstitutional. It resorts to the constitutional argument as a basis for supporting its contention that the trustee cannot be an employer within the meaning of the PBA. We will examine the constitutional issue in more detail below.

The appellant also raised as a ground of appeal the validity of an arbitration award (the SERP award) which was issued after St. Marys bankruptcy in proceedings taken before the bankruptcy. This ground of appeal was abandoned.

THE FACTS

The facts, which are not in any material dispute, do not have to be set out in detail. It will be sufficient to note that St. Marys operated a large paper mill in Sault Ste. Marie, Ontario. By April 1993, if not before, it ceased to be able to meet its liabilities as they became due. On April 26, 1993, Farley J. appointed the appellant receiver-manager of St. Marys and all of its assets. On the same day, but after the order appointing the appellant as receiver-manager, Farley J. found St. Marys to be bankrupt and a receiving order was made against it. The appellant was appointed the trustee of the bankrupt estate.

The appellant, in its capacity as trustee in bankruptcy, went into possession on April 28, 1993, further to the April 26, 1993 reviewing order. By that time the appellant, on the instructions of a consortium of secured creditors (seven banks owed approximately $200 million) attempted to continue St. Marys business, on the assumption that its sale price would be enhanced if it were offered for sale as a going concern. On May 14, 1993, the appellant entered into an agreement with itself in which it was provided that the appellant, as trustee in bankruptcy, would operate St. Marys business and that in that capacity it would remit all accounts receivable and proceeds of assets sold to itself, in its capacity as receiver.

On the basis of the material, and what we were told by counsel, the beneficiaries of the decision to continue the operation of St. Marys business could only be its secured creditors. It is unlikely that the unsecured creditors will receive anything.

Once the critical decision to continue St. Marys business operation was made, an employment agreement with the union and non-union employees had to be concluded as the bankruptcy had terminated their employment, and the appellant obviously needed a labour force to carry on St. Marys mill operation. After a short period of negotiations, the trustee engaged the services of St. Marys union and non-union employees from April 28, 1993 onward, on a week-to-week basis, at the same hourly rate (except for prepaid vacation pay) with the same benefit package and the same work practices as existed before the bankruptcy. In addition, the appellant agreed to continue the union and non-union pension plans. Further to that aspect of its deal with the employees, the appellant agreed to continue to deduct employee pension plan contributions and to remit those contributions to the plans' trustee. The appellant also agreed to pay the plans' current service costs (referred to in the PBA as "normal costs"). These costs are the estimated costs of funding the benefits accruing under the plans in the current year. The appellant made it clear that it would not be responsible "for any obligations of St. Marys . . . such as termination pay, severance pay or unfunded pension liabilities". The employees agreed to these arrangements.

The pension arrangements were a manifestation of the workers' apparent insistence on maintaining existing working arrangements. It was important to St. Marys workers, which the appellant sought to hire, that their employment by the appellant give rise to a continued accrual of pensionable service. The appellant confirmed the basis upon which it hired St. Marys employees in correspondence with the Pension Commission of Ontario. The information provided to the Commission was consistent with the terms of employment set out above.

The appellant also advised the Pension Commission of Ontario that it would not act as administrator of the union and non- union pension plans. In that letter the appellant stated that it looked to the Pension Commission of Ontario to appoint an administrator of both the union and non-union plans.

The respondent Price Waterhouse was appointed administrator of the union and non-union pension plans on July 15, 1993, under s. 71(1) of the PBA. On August 12, 1993 it advised the appellant of its position that, by hiring St. Marys employees and by continuing the pension plans, the appellant had become an "employer" under the PBA, and was therefore liable for special payments required to be paid as a consequence of unfunded liabilities existing in both pension plans. The existence of unfunded liabilities in both union and non-union pension plans is not in issue, nor is the quantum of the plans' unfunded liabilities.

ANALYSIS

1. The Statutory Scheme

Workers are not, as of right, entitled to a pension plan and employers are under no statutory obligation to provide one. However, if there is a pension plan, the employer's promise to pay pension benefits under the plan is a promise which is subject to the carefully calibrated regulatory scheme set out in the PBA and its regulations. The PBA sets out minimum standards which must be met. We have set out in Appendix "A" those sections of the PBA which we consider to be relevant. Where desirable, for the purposes of clarity, we will set out specific sections that are referred to in these reasons.

The PBA applies to all pensions in Ontario (s. 3). The standards set out in the PBA are minimum standards (s. 5). Thus, a pension plan may provide benefits that are more generous than those required by the PBA; however, it may not provide lesser benefits. All pension plans must be registered (s. 6). A pension plan is not eligible for registration unless it provides for funding sufficient to provide the benefits under the pension plan, in accordance with the PBA and its regulations (s. 55(1)). Every pension plan must set out the obligation of the employer to pay current service costs, going concern unfunded actuarial liabilities and solvency deficiencies (s. 4(1), R.R.O. 1990, Reg. 909). The PBA sets out who is eligible to be a pension plan administrator (s. 8) and imposes an obligation on the plan administrator to register the plan within 60 days of the date on which the plan is established (ss. 9, 13 and 14). A plan administrator is required to administer the plan in accordance with the PBA and regulations (s. 19). The information required in pension plan documentation is set out in detail in the PBA (s. 10). The Superintendent of Pensions may refuse to register, or may revoke the registration, of a pension plan which does not comply with the PBA and regulations (s. 18).

An employer required to make contributions under a pension plan must make those contributions to the pension fund in the prescribed manner and in accordance with the prescribed requirements for funding (s. 55(2)(a)). An employer required to make contributions under a pension plan must pay to the pension fund amounts not less than the pension contributions received from the employees, the plan's current service costs (or normal costs) and special payments required to be paid on account of any going concern actuarial unfunded liabilities in the plan. These special payments must be paid in equal monthly instalments over a 15-year period (Reg. 909, ss. 4(2) and 5(1)).

2. The Continuation of the Pension Plans

In April 1993, with the approval of the inspectors of St. Marys bankrupt estate, the creditors of St. Marys made a pivotal decision that led to an employment arrangement which provides the factual underpinning for the motions judge's conclusion that the appellant was the employer of the members of St. Marys union and non-union pension plans. As noted, a decision was made to continue St. Marys business operation. The appellant was to operate the business. To do so it needed workers. It therefore negotiated employment arrangements with both union and non-union employees. As far as the workers were concerned it was business as usual; they were to receive the same wage and benefit arrangements as before the bankruptcy.

As a result of its deal with the workers, the appellant agreed to pay employee pension contributions and current service costs to the pension plans. It honoured those obligations, that is it deducted employee pension contributions, remitted those contributions to the trustee and paid the required current service costs. In proceeding as it did, the appellant continued the pension plans and in our view adopted them.

3. Was the Appellant an "Employer" Under the PBA

"Employer" is defined in s. 1 of the PBA, as follows:

> "employer", in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning;

The obligations of an employer required to make contributions under a pension plan (including special payment obligations) are established by the combined effect of s. 55(2) of the PBA and ss. 4(2) and 5(1)(b) of Reg. 909. Those sections provide:

> 55(2) An employer required to make contributions under a pension plan, or a person required to make contributions under a pension plan on behalf of an employer, shall make the contributions in the prescribed manner and in accordance with the prescribed requirements for funding,
>
> (a) to the pension fund; or
>
> (b) if pension benefits under the pension plan are paid by an insurance company, to the insurance company that is the administrator of the pension plan.
>
> . . . . .
>
> 4(2) An employer required to make contributions under a plan or a person required to make contributions under a plan on behalf of an employer shall make payments to the pension fund or to the insurance company, as applicable, of amounts that are not less than the sum of,
>
> (a) all contributions received from employees, including money withheld by payroll deduction or otherwise from an employee, as the employee's contribution 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.
>
> . . . . .
>
> 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;

The appellant contends that it is not an "employer" for PBA purposes. With respect to the appellant's PBA status as an "employer" as defined in s. 1 of the PBA, the appellant's argument focuses on the meaning to be given to the word "remuneration" as it appears in the PBA definition of "employer". Since there is no definition of the term "remuneration" in the PBA, the appellant submits that the applicable definition must be extracted from the language of the two plans which define "earnings" but not "remuneration".

The appellant submits that the PBA definition of "employer" does not include every person who engages workers. As the appellant's factum puts it, "employer" is restricted to persons "who pay remuneration to which the pension plan is related". The appellant notes that the plans define "earnings" as "salary, wages, payments under incentive plans and other remuneration for services, as determined by the Company in accordance with its normal practices from time to time". The appellant's position is that what it paid to the workers was "earnings" as defined in the pension plans.

The appellant completes the "remuneration" circle by arguing that what the employees received, although wages (that is earnings as referred to in the plans) in the generic sense, was not "determined by the Company". The basis of this argument is that the appellant is not the "Company" as defined in the two pension plans. In those plans, "Company" is defined in this way:

> "Company" means St. Marys Paper Inc. or any successor thereof and any of its subsidiary [sic] associated or affiliated companies which shall adopt this Plan . . .

The appellant submits that it is not St. Marys, a successor company or a subsidiary, and that it is, therefore, not the "Company", as defined in the plans. Accordingly, the appellant says what it paid the workers was not earnings as defined in the pension plans, and that what the workers received was not paid by the "Company", as defined in the pension plans. Therefore, the appellant submits that since the workers did not receive "earnings" from the appellant, what the workers did receive was not "remuneration" as referred to in the PBA definition of "employer". According to the appellant there is, therefore, in this case, no "remuneration to which the plans relate". In result, the appellant submits that it is not an "employer" for PBA purposes and that Farley J. was wrong in reaching the conclusion he did on the "employer" issue.

The appellant contends that it must be both an "employer" within the meaning of the PBA, and an employer "required to make contributions under a pension plan" under s. 55(2) of the Act, before it is required to pay the special payments on account of the plan's unfunded liabilities which are sought here. Its position is that it is neither an employer, nor an employer "required to make contributions under a pension plan". Thus by the combined operation of the definition of employer contained in s. 1 and the contribution requirements referred to in s. 55(2) of the PBA, the appellant submits that it is not liable for the special payments in issue here.

The appellant submits that even if it is an "employer" under s. 1, it is only obliged to make the special payments sought if, under s. 55(2) it is, as the appellant's factum states, "bound to do so by the terms of the Plans". The appellant argues that the plans do not explicitly bind it. This is a continuation of its argument that it is not St. Marys (the "Company") with the result that even if it is an employer for PBA purposes, it is not, under s. 55(2), an employer required to make contributions under a pension plan.

It is essential to the appellant's position that the inquiry move from the PBA to the two pension plans. That is to say, the appellant seeks to define "remuneration" in the PBA definition of "employer" by resort to the pension plans' definitions of "earnings". It is only on the basis of the pension plans' definitions of "earnings" and "Company" that the appellant is able to submit that what it paid to the workers was not remuneration to which the pension plans are related. The appellants, using the pension plans' definition of "earnings" as a proxy for the PBA reference to "remuneration" in the definition of "employer", and also using the pension plans' definition of "Company", puts it this way in its factum:

> The monies paid by the Trustee [the appellant] are not salary, wages . . . or any other remuneration for services determined by the "Company" in accordance with the "Company's" normal practices.

In our opinion, this approach in inconsistent with the basic philosophy and purpose of the PBA. It would allow a pension plan's provisions to control status (the "employer" issue). In the result, it would be the definitional elements of the plan, not, as we think was intended, the PBA, which would determine the status of the person from whom the workers received their wages. Consequent upon that determination, the plan would determine whether the payor had the PBA obligations of an "employer".

The interpretation urged upon us by the appellant would seriously erode the protection afforded to members and former members of the pension plans provided by the PBA, which is manifestly intended to impose a degree of control over the terms and operation of pension plans.

Farley J. in this case and Henry J. in Salvation Army, Canada East v. Ontario (Attorney General) (1992), 1992 CanLII 8622 (ON SC), 40 C.C.E.L. 130, 92 D.T.C. 238 (Ont. Gen. Div.), resorted to a dictionary definition of "remuneration" as that word appears in the PBA definition of "employer". We agree with that approach. To look to the plan to determine the status of the person from whom the workers received their wages is inconsistent with the scheme of the Act. Although Henry J. in Salvation Army did not deal explicitly with the issue, he concluded that a payment of remuneration which the Salvation Army characterized as gratuitous was, none the less, "remuneration" (in the context of the definition of "employer"). That decision can be more easily understood once one accepts the thesis that the payor's characterization of what is received by employees cannot defeat the objective meaning of the language used in the PBA, that is whether what was received was remuneration to which the pension plan is related.

Thus, it seems to us that the inquiry must be first, whether the members (or former members) of the plans received remuneration, as they clearly did here, and second, whether the remuneration was remuneration to which the pension plan was related.

What the pension plan members received was "remuneration" if that word is given its ordinary meaning. As we have stated, one of the goals of the plan members in their negotiations with the appellant was to achieve an employment deal under which the accrual of pensionable service would continue. The appellant was agreeable to that. However, the appellant essentially wanted to put in place a pension plan which did not conform with the PBA, in that the employer would not be responsible for unfunded pension liabilities. The employment arrangement achieved that purpose. The appellant withheld an agreed part of the employees' remuneration and remitted what was withheld to the trustee of the plans. In addition, as noted, the appellant paid the current service costs of the plans. The employees' retirement benefits were affected by their time of service, earnings and pension contributions while they were employed by the appellant. Further, the record reveals that some employees became eligible to retire, and did retire, with pension benefits after they were hired by the appellant. Their pensions, and all employee pensions, were affected by the pension arrangement made by the appellant and the plan members. In our view, the remuneration received by the employees was remuneration to which the relevant pension plan was related.

4. What are the Appellant's Obligations as Employer

The PBA and regulations impose an obligation on an "employer" to ensure that a pension plan is adequately funded, both on an ongoing basis and on a wind-up of the plan. This obligation exists quite apart from the particular funding requirements set out in the pension plan itself. This obligation is central to the regulatory scheme established by the PBA. The Act requires that its minimum funding standards be met. It does not allow for special deals which dilute or might eliminate these minimum funding requirements. Thus, the fact that the workers may be taken to have agreed that the appellant would not be responsible for the plans' unfunded liabilities is no assistance to the appellant. Moreover, as the respondent union submits, these are interests which were not represented when the appellant and the union and non-union workers made their employment deal. The unrepresented interests include retirees, survivors of retirees and deferred vested plan members who are entitled to pension benefits but who are no longer employed.

In our opinion, the appellant was an "employer" which was obligated by its agreement with the employees, and was therefore required by statute to make contributions under the two pension plans. Section 4(1) of Reg. 909 makes no distinction among payments which must be made by an employer required to make payments under a pension plan. The employer must remit to the plans' trustee all of the contributions it receives from employees, pay current service costs and pay all required special payments. The employer's obligations include the obligation to make special payments attributable to the unfunded liabilities of the plan. An employer cannot choose which of its funding obligations in respect of an opinion pension plan it will honour. If it could, the basic protection provided to members and former members of pension plans by the PBA would be substantially diminished in their value.

Although it undoubtedly did not intend to do so, in our view, the appellant dealt with St. Marys workers in such a way as to make itself liable for special payments in respect of the two pension plans' unfunded liabilities.

5. The Constitutional Issue

The appellant filed a notice of constitutional question for the first time on appeal. The Attorney General of Canada did not intervene in response to it, but the Attorney General of Ontario did. The Attorney General supports the preliminary position of the respondent that the constitutional question should not be permitted to be raised for the first time on the appeal. There is nothing to suggest that the appellant failed to raise this issue before Farley J. in the hope of gaining an advantage in the event of an appeal. As we find that we can dispose of the constitutional argument without the need for the additional facts that the Attorney General submits may have a bearing on the issue, we do not give effect to that preliminary objection.

The appellant submits that the interpretation given by Farley J. to the word "employer" in s. 1 of the PBA was not open to him in light of the conflict that such an interpretation produces between the PBA, a provincial statute, and the BIA, a federal and therefore paramount statute. More specifically, it is argued that if the appellant is an employer within the meaning of s. 1 of the PBA, the special payments that the appellant will be required to make on account of the unfunded liabilities under the two pension plans will become an expense of the appellant as trustee and, as such, will attract the priority provided for in s. 136(1)(b)(i) of the BIA. The appellant argues that this has the effect of elevating a claim provable in the bankruptcy to the priority reserved for the expenses of the trustee, and that a provincial statute cannot be interpreted so as to alter the priorities established in the federal BIA. This argument rests on the presumption of constitutionality which requires that, if two interpretations of a provincial statute are open, the statute be construed in a manner that avoids invalidation under the doctrine of paramountcy: see Deloitte Haskins & Sells Ltd. v. Workers' Compensation Board, 1985 CanLII 82 (SCC), [1985] 1 S.C.R. 785 at p. 806, 19 D.L.R. (4th) 577, per Wilson J.

We have heard a variety of arguments, many of which do not fall to be decided in this appeal, on the issue of whether the special payments required to be made by the appellant, if it becomes an employer within the meaning of the PBA, would alter the priorities provided for in the BIA. For example, Mr. Scott, for the employees and the Union, submits that the special payments do not constitute provable claims of the employees in the bankruptcy, as St. Marys special payments were not in arrears as of the date of the bankruptcy. On that basis, Mr. Scott advanced the argument that if the special payments made by the appellant are recoverable under s. 136 of the BIA, there is no reranking of the employees' claim under the superior priority of the appellant, as trustee, for its fees and expenses, since the employees had no claim to start with.

Mr. Stewart, counsel for the Attorney General, contends that Farley J.'s interpretation of the word employer in the PBA is not offensive to the priority scheme in s. 136 of the BIA if the special payments for unfunded liabilities are secured claims of the administrator of the plans, pursuant to s. 57 of the PBA, and that such a question cannot be determined on the evidentiary record in this case.

All responding counsel support the position taken by Mr. Staley, for Price Waterhouse, that even if the special payments obligations of St. Marys are claims provable in the bankruptcy, to rank rateably under s. 141 of the BIA, and even if the appellant's special payments required by the plans' unfunded liabilities could be claimed as an expense of the trustee under s. 136(1)(b)(i) of the BIA, there is still no constitutional impediment to the appellant being an employer under the PBA. This is because the liability of the appellant is a separate obligation of the trustee, independent and possibly different in scope from the obligations of the bankrupt. The respondents submit that the trustee's obligation to make the special payments in issue arises as a result of the acts of the trustee and not as a result of the compulsion of a provincial statute.

The doctrine of paramountcy has no application unless there is an otherwise unavoidable conflict between the federal and the provincial statute. It should not be invoked to curtail the valid exercise of provincial powers as a prophylactic measure against situations in which the two statutes may come into play. We must therefore examine whether there is any conflict, operational or otherwise, between the PBA and the BIA, such as to require an interpretation of the word "employer" in the PBA that is different from the interpretation suggested by commonly accepted canons of construction.

The appellant cannot point to any direct, express, or apparent conflict between sections of the two Acts, as was the case, for instance in Deloitte Haskins & Sells, supra. Moreover, the appellant's argument is not based on the existence or effect of s. 57 of the PBA which deems the employees' contributions withheld by the employer, and the employer's own contributions to the plan, to be held in trust, and which creates a charge on the assets of the employer. On the record before us, it could not be determined whether this provision could be invoked in any event. Furthermore, if a charge existed in favour of the administrator of the plan, and was a validly created charge, it would put the administrator in the position of a secured creditor. This is not what the appellant alleges creates an impermissible provincial alteration of the BIA priorities. The appellant's argument is simply that the special payments that the appellant would be required to make if it became the employer under the PBA are claims provable in the bankruptcy which would be elevated, by operation of the provincial statute, to the priority afforded to fees and expenses of a trustee in s. 136(1)(b)(i) of the BIA. Hence, it is argued that if the provincial legislation can have the effect of affecting the federal ranking of preferred creditors, it is in operational conflict with the BIA.

For the purpose of addressing the appellant's contention, it can be assumed that the employees would have a claim provable in the bankruptcy referrable to the unfunded liabilities under the plans. The appellant does not contend that the employees' claim is, as such, ranked as a preferred claim under s. 136 of the BIA. Within the appellant's argument, the employees' claim, assuming that it exists, is an unsecured claim which does not enjoy any priority under s. 136, and which therefore ranks rateably under s. 141 of the BIA. Assuming that the liability of the appellant as an employer would entitle the appellant to recover any amount paid under the priority afforded by the BIA to expenses and fees of the trustee, can it be said that the provincial statute generates an operational conflict with the BIA?

In our opinion, it cannot be contended that the province, by enacting a definition of employer in the PBA that is capable of including a trustee in bankruptcy, was attempting to establish a priority to the claim for unfunded pension liabilities so as to elevate its ranking in the case of bankruptcy. Nor do we think that the PBA has that effect. The PBA does not require a trustee in bankruptcy to become the employer of the bankrupt's employees. Nor, obviously, does the PBA require a trustee to discharge the obligations of the bankrupt to make the special payments for unfunded liabilities. The appellant, as trustee, was empowered to enter into a contract with the employees and to agree to make some contributions to the pension plans, by virtue of its general powers under the BIA, and particularly by virtue of its power to carry on the business of the bankrupt under s. 30(1)(c) of the BIA. The appellant agreed to continue the two pension plans as part of the deal it made with the employees. The consequences that flow under provincial law from the course of action taken by the appellant are not invalid or inoperative merely because they are attached to the acts of a trustee in bankruptcy. If the appellant can recover the payments required to be made under the PBA as an expense of the trustee, this would be by operation of the federal statute, and not by direction of the PBA.

Moreover, we agree with the respondent's contention that the liability imposed upon the appellant as employer under the PBA is a separate liability of the appellant rather than a duplication of the obligation of St. Marys, and therefore does not operate to alter the ranking of St. Marys obligation under the BIA.

The PBA contemplates that there can be several different employers during the existence of a pension plan. Each employer incurs the obligation to make the special payments that s. 5 of Reg. 909 requires be paid. If the Superintendent orders the winding-up of the plan, which may be done in the case of bankruptcy but is not automatic, pursuant to s. 69 of the PBA, the Superintendent fixes the effective date of the winding-up (s. 69(2)). The obligations of the employer in the case of a winding-up of the plan are set out in s. 75 of the PBA.

We find it unnecessary in this case to address the issue raised by Mr. Scott to the effect that the appellant is a successor employer within the meaning of that term in the PBA. It is clear that the plan was not automatically terminated by the bankruptcy and that a subsequent employer, whether a successor employer or not, may incur the special payment obligations imposed on an employer by the PBA, for example, if there are unfunded liabilities in the plan. The actions of the appellant have led to the appellant becoming an "employer" and thereby incurring special payment obligations separate from those of the bankrupt previous employer. There is therefore no impediment under the PBA to treating the appellant's obligations as separate and distinct from that of the bankrupt. Such a conclusion is indeed consistent with the wording and intent of the PBA.

Nor do we see any impediment to that conclusion in the BIA. Section 31(4) of the BIA deems all debts incurred in carrying on the business of a bankrupt to be incurred by the estate of the bankrupt. This presumption is not irrefutable, nor is it incompatible with the personal liability of the trustee, in appropriate circumstances. In a section entitled "Trustee Protecting Himself Against Liability for Debts and Liabilities Incurred in Carrying on the Business of the Bankrupt", Houlden and Morawetz state, in Bankruptcy and Insolvency Law of Canada, 3rd ed., vol. 1 (Toronto: Carswell, 1992) at pp. 103-04:

> Notwithstanding s. 31(4), there are still situations where a trustee may be personally liable for obligations incurred in carrying on the debtor's business. Thus, if a trustee enters into a contract to act as agent for a secured creditor in realizing its security and in doing so carries on the business of the bankrupt, s. 31(4) is no protection to the trustee. In these circumstances, the trustee is personally liable to account to the secured creditor for the proceeds of the realization and if he fails to do so, judgment will be given against him personally for the amount owing: Re P.E. Lapierre Inc.; Bank of Nova Scotia v. Gagnon (1970), 16 C.B.R. (N.S.) 43 (Que. S.C.). Again, if a supplier will not supply goods unless the trustee pledges his personal credit and the trustee accepts the goods on that basis, the trustee will, notwithstanding s. 31(4),

be personally liable to the supplier: Transalta Utilities Corp. v. Hudson (1982), 1982 CanLII 1201 (AB QB), 44 C.B.R. (N.S.) 97, 22 Alta. L.R. (2d) 139, 40 A.R. 134 (M.C.).

In Clifford Van & Storage Co. v. Clifford Van & Storage Co.
(Trustee of) (1989), 73 C.B.R. (N.S.) 129, 4 R.P.R. (2d) 292 (Ont. S.C.), a trustee occupied the bankrupt's premises for a period of seven weeks and during this period, continued to operate the business of the bankrupt. When the trustee vacated the premises, he left them in such a state of disarray and uncleanliness that it cost $3,000 to clean them up. The court held that the bankrupt estate and the trustee personally were liable for the damages.

In J.B. Ellis & Co. v. Deloitte Haskins & Sells Ltd.
(1989), 1989 CanLII 2817 (BC SC), 76 C.B.R. (N.S.) 160, 39 B.C.L.R. (2d) 388, [1990] 1 W.W.R. 350 (S.C.), a customs agent, prior to bankruptcy, requested the release from Canada Customs of certain goods which had been purchased by the bankrupt. The goods were released after bankruptcy by Canada Customs and were received and sold by the trustee in bankruptcy. The customs agent paid excise tax on the goods after bankruptcy and claimed against the trustee personally for the amount of the tax. It was held that there was no personal liability on the trustee that the customs agent only had a preferred claim in the bankruptcy. The Ellis case should be contrasted with Re St. Louis Textiles Ltd.; M.N.R. v. Blais (1983), 48 C.B.R. (N.S.) 98, affirmed (sub nom. Blais v. Dept. of Nat. Revenue) 56 C.B.R.
(N.S.) 1, 1985 CanLII 38 (SCC), [1985] 1 S.C.R. 849, 20 D.L.R. (4th) 160, 85 D.T.C. 5285, 60 N.R. 12 (S.C.C.), where a trustee in bankruptcy sold goods that were subject to sales tax. It was held in the St. Louis case, that the trustee in bankruptcy was personally liable for the tax and could deduct the amount paid as an expense of the administration of the bankrupt estate.

Section 14.06(2) of the BIA expressly exempts trustees from personal liability for environmental damage occurring after their appointment unless the trustee has failed to exercise due diligence. There is no such statutory exemption to shelter a trustee from liabilities arising out of taxation or employment statutes.

The deal made by the appellant with the unionized and non- unionized employees of St. Marys was a deal made on behalf of and for the benefit of the secured creditors of St. Marys, who were hoping to increase their recovery if St. Marys could be sold as a going concern. As has been noted, this was a business decision implemented by the appellant. As for the fact that the appellant was apparently not aware of the full scope of its obligations under the PBA, and indeed attempted to contract out of the statutory obligation to make the special payments, this cannot, in our opinion, alter the legal consequences of appellant's chosen course of action. The appellant was entitled to refuse to undertake such obligations without proper indemnification by the secured creditors (s. 32 BIA).

It is clear that the appellant had to engage its personal liability, presumably with the benefit of an appropriate indemnity, when it undertook this obligation since it was an obligation that the estate was in no position to satisfy.

As a result, the liability of the appellant as an employer under the PBA is distinct from St. Marys' obligations as a bankrupt employer. The possibility that the appellant may have a claim against the bankrupt's estate for the expense that it will incur as an employer does not elevate or in any other way alter the provable claim that the employees have in the bankruptcy. There is therefore no operational conflict between the provincial and the federal statutes, and thus no need to vary the interpretation of the word "employer" in the PBA so as to exclude a trustee in bankruptcy that would otherwise fall squarely within that definition.

Disposition

For these reasons, we would dismiss the appeal with costs.

7ABELLA J.A. (dissenting): -- I have had the benefit of reading the reasons of Arbour and Osborne JJ.A. but have a different view about whether the trustee is an "employer" within the meaning of the Pension Benefits Act, R.S.O. 1990, c. P.8 (P.B.A.).

There is no requirement in Ontario that an employer establish a pension plan. Its willingness to do so is a matter of contract between it and its employees. Once established, however, there is no doubt that compliance with the provisions of PBA is mandatory. There is also no doubt that a trustee in bankruptcy can, in extremely rare circumstances, become an employer and can, as such, become bound by statutory requirements. In the circumstances of this case, however, I am not persuaded that the trustee has stepped out of its traditional role and into the shoes of the employer.

The trustee was under no obligation to carry on the business of the paper mill. Its decision to do so was to the benefit of the 457 employees whose employment ceased with the bankruptcy. One of the terms of employment requested by the unionized and non-unionized employees was that the trustee pay current service costs owing under the pension plan. The trustee agreed, but disclaimed any responsibility for any other obligations under the plans, including the unfunded liability which it advised the employees was a claim in the bankruptcy. Every former employee hired by the trustee received a letter confirming the arrangement as part of the terms of employment. It is undisputed that the trustee would not have agreed to pay the current service costs under the plans if this had resulted in the trustee becoming liable for the unfunded pension fund liability.

In my view, no liability is imposed by the PBA on any employer unless that employer has agreed to provide a pension plan. A successor employer can undoubtedly explicitly agree to continue to be bound by a previous owner's plan. Once it so agrees, it is required to make all payments stipulated under the plan and to comply with all relevant legislative requirements. But I do not agree that the payment of current service costs and related actions by the trustee in the unusual circumstances such as existed in this case triggers all other PBA employer duties.

The trustee is not a successor employer: Re Rizzo and Rizzo Shoes Ltd. (1991), 1991 CanLII 7316 (ON SC), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246 (Gen. Div.). It has not been so found by the Ontario Labour Relations Board, which has exclusive jurisdiction to make such a declaration in a unionized workplace (Great Atlantic & Pacific Co. of Canada v. Vance, a judgment of the Ontario Court (General Division) Divisional Court, released January 24, 1994 [now reported at 1994 CanLII 10530 (ON SC), 16 O.R. (3d) 316, 111 D.L.R. (4th) 328]); it has not purchased the assets of the former employer; and most decidedly did not agree to become contractually bound by the terms of the pension plans. On the contrary, its legal position as a trustee temporarily arranging to keep the business viable until a new employer could be found, and as one agreeing to restrict its obligations to current service cost contributions, was made clear to all employees when the trustee agreed to continue the business of the bankrupt company.

Section 55(2) of the PBA states that contributions should be made by an employer "in the prescribed manner and in accordance with the prescribed agreement for funding". But only "an employer required to make contributions under a pension plan" is caught by this duty. The trustee is not required to make contributions. It is not, therefore, an employer under the PBA liable for the special payments or any unfunded liability. Similarly, its payments of the current service costs would not entitle it to apply for any surplus in the plans. Its behaviour has not attracted either any benefits or burdens under the plans.

Any other interpretation unduly interferes with the fiduciary nature of the trustee's role. Except in clearly defined circumstances, the duties it assumes in discharging responsibilities to creditors, including employees, do not make it personally liable for liabilities of the bankrupt that arose prior to the bankruptcy. This is clear from s. 31(4) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, which provides that all debts incurred and credit received in carrying on the business of a bankrupt are deemed to be incurred and received by the estate. Making the trustee responsible for the plan's unfunded liability makes the trustee liable for previously incurred liabilities.

The trustee is a creature of statute whose mandate is to liquidate the assets of the bankrupt so that they can be distributed to those who are entitled to them. It holds any property of the bankrupt in trust for those entitled to a share of it.

In fulfilling this mandate, the trustee may carry on the business for a limited time. It is obviously not at liberty to do so without regard to operative employment laws that seek to protect workers from exploitation, but that is far from the situation here.

Contracts of employment with employees, including collective agreements, terminate with a bankruptcy. The trustee decided to try to save the business and, in so doing, the jobs of almost 500 workers. It had no obligation whatever to continue the pension plans and could easily have wound them up. Instead, the employees asked that current services cost contributions be paid so that a new purchaser would have the option of continuing the plans and assuming employer obligations under them. The trustee acceded to the request in the interests exclusively of the employees.

This concession unravelled a chain of unanticipated events that resulted ultimately and ironically in a claim by those same employees for a result neither they nor the trustee had intended or expected.

Their assertion, if accepted, acts as a determinative barrier to the assumption by a trustee of any pension plan continuity where a bankrupt business is operated and sold as a "going concern". This invites the automatic termination of pension plans upon bankruptcy by trustees unwilling to risk extraordinary long-term liabilities for the short-term accommodation of employees.

The PBA is legislation designed to protect employees' pension plans from arbitrary erosion and should be interpreted accordingly. I would prefer to interpret the PBA in a way which both respects the unique role of the trustee in circumstances such as these, and encourages conduct which inures to the benefit of employees covered by pension plans. A more technical reading of the PBA, rendering the trustee an inadvertent employer under the Act by its current service cost payments, discourages both.

I agree with Farley J.'s comments when he states in his reasons [(1993), 1993 CanLII 5451 (ON SC), 15 O.R. (3d) 359 at p. 364, 107 D.L.R. (4th) 715 (Gen. Div.)]:

> . . . it would seem to be in everyone's best interests to allow a trustee in bankruptcy the flexibility of seeing if an undertaking could be sold on a going concern basis while maintaining current payments but not exposing the trustee to liability for past unfunded liabilities.

I do not, however, share his view that the PBA precludes this option. In my opinion, the trustee is not an "employer required to make contributions under a pension plan" as contemplated by s. 55(2), and accordingly is not liable for any of the unfunded liabilities.

I would allow the appeal with costs, set aside the order of Farley J., and declare that the trustee is not liable as an employer for any special payments for unfunded liabilities under the plans.

Appeal dismissed.

Tab 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Windsor Machine & Stamping Ltd., Re | 2009 CarswellOnt 4471, 55 C.B.R. (5th) 241, [2009] O.J. No. 3195, 179 A.C.W.S. (3d) 611 | (Ont. S.C.J. [Commercial List], Jul 27, 2009)

2007 ONCA 810
Ontario Court of Appeal

1231640 Ontario Inc., Re

2007 CarswellOnt 7595, 2007 ONCA 810, [2007] O.J. No. 4561, 13 P.P.S.A.C. (3d) 57, 163 A.C.W.S. (3d) 474, 289 D.L.R. (4th) 684, 37 C.B.R. (5th) 185

IN THE MATTER OF THE BANKRUPTCY OF 1231640 ONTARIO INC. (formerly known as The State Group Limited) OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

THE ROYAL BANK OF CANADA, in its capacity as administrative agent for certain lenders (Appellant) and PRICEWATERHOUSECOOPERS LLP, TRUSTEE OF THE ESTATE OF 1231640 ONTARIO INC., A BANKRUPT and ST. PAUL GUARANTEE INSURANCE COMPANY (Respondents)

K.M. Weiler, K. Feldman, H.S. LaForme JJ.A.

Heard: May 10, 2007
Judgment: November 26, 2007
Docket: CA C45883

Proceedings: affirming *1231640 Ontario Inc., Re* (2006), 23 C.B.R. (5th) 92, 2006 CarswellOnt 4406 (Ont. S.C.J.)

Counsel: Peter H. Griffin, Matthew Sammon for Appellant, Royal Bank of Canada in its capacity as Administrative Agent for Certain Lenders
John D. Marshall for Respondent, St. Paul Guarantee Insurance Company
Alex MacFarlane for Respondent, PricewaterhouseCoopers Inc., in its capacity as Trustee in Bankruptcy of 1231640 Ontario Inc. (formerly known as The State Group Limited)

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency

X Priorities of claims
X.1 Secured claims
X.1.c Loss of secured status
X.1.c.iii Effect of P.P.S.A.

Personal property security

III Perfection of security interest
III.1 Registration
III.1.d Maintaining perfection
III.1.d.i Changes and amendments
III.1.d.i.A Change of debtor name

Personal property security

III Perfection of security interest
III.1 Registration
III.1.e Errors in completing financing statements
III.1.e.i Wrong or incomplete name of debtor
III.1.e.i.B Miscellaneous

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Loss of secured status — Effect of P.P.S.A

When bank sought appointment of interim receiver of debtor company, it held perfected security interest over assets of debtor — During receivership, bank allowed its registration under Personal Property Security Act ("PPSA") to lapse — Bank did not re-perfect its security interest before interim receiver assigned debtor into bankruptcy, following which significant tax refund came into debtor's estate — Bank asserted priority under ss. 20(1)(b) and 20(2)(b) of PPSA over tax refund and some undistributed funds on basis that bank's security interest was perfected on date when receiver was appointed — Trustee in bankruptcy argued that relevant date for determining priority was date of assignment into bankruptcy and on that date, bank's security interest was unperfected as against trustee and ranked as unsecured creditor — Trustee sought direction of court on priority issue — Motion judge dismissed bank's claim on basis that s. 47 Bankruptcy and Insolvency Act ("BIA") receiver was not person who represents creditors of debtor under s. 20(1)(b) of PPSA — Motion judge found that appointment order did not exempt bank from complying with PPSA by filing financing change statement within 30 days of learning that debtor's name was sold, nor did stay provisions of order prevent bank from seeking to lift stay in order to file financing change statement — Bank appealed — Appeal dismissed — Bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b) — Motion judge was correct that receiver was not representative of creditors within meaning of ss. 20(1)(b) and 20(2)(b) — Bank's security interest became unperfected as result of s. 48(3) of PPSA and because it did not re-perfect its security interest before assignment of debtor into bankruptcy — Bank's security interest was perfected on date of appointment of trustee and its security interest was therefore ineffective against trustee — Bank lost its priority over other creditor that also lost its secured standing and both creditors were unperfected on date of appointment of trustee and both their security interests were ineffective against trustee.

Personal property security — Perfection of security interest — Registration — Maintaining perfection — Changes and amendments — Change of debtor name

When bank sought appointment of interim receiver of debtor company, it held perfected security interest over assets of debtor — During receivership, bank allowed its registration under Personal Property Security Act ("PPSA") to lapse — Bank did not re-perfect its security interest before interim receiver assigned debtor into bankruptcy, following which significant tax refund came into debtor's estate — Bank asserted priority under ss. 20(1)(b) and 20(2)(b) of PPSA over tax refund and some undistributed funds on basis that bank's security interest was perfected on date when receiver was appointed — Trustee in bankruptcy argued that relevant date for determining priority was date of assignment into bankruptcy and on that date, bank's security interest was unperfected as against trustee and ranked as unsecured creditor — Trustee sought direction of court on priority issue — Motion judge dismissed bank's claim on basis that s. 47 Bankruptcy and Insolvency Act ("BIA") receiver was not person who represents creditors of debtor under s. 20(1)(b) of PPSA — Motion judge found that appointment order did not exempt bank from complying with PPSA by filing financing change statement within 30 days of learning that debtor's name was sold, nor did stay provisions of order prevent bank from seeking to lift stay in order to file financing change statement — Bank appealed — Appeal dismissed — Bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b) — Motion judge was correct that receiver was not representative of creditors within meaning of ss. 20(1)(b) and 20(2)(b) — Bank's security interest became unperfected as result of s. 48(3) of PPSA and because it did not re-perfect its security interest before assignment of debtor into bankruptcy — Bank's security interest was perfected on date of appointment of trustee and its security interest was therefore ineffective against trustee — Bank lost its priority over other creditor that also lost its secured standing and both creditors were unperfected on date of appointment of trustee and both their security interests were ineffective against trustee.

Personal property security — Perfection of security interest — Registration — Errors in completing financing statements — Wrong or incomplete name of debtor — Miscellaneous

When bank sought appointment of interim receiver of debtor company, it held perfected security interest over assets of debtor — During receivership, bank allowed its registration under Personal Property Security Act ("PPSA") to lapse — Bank did not re-perfect its security interest before interim receiver assigned debtor into bankruptcy, following which significant tax refund came into debtor's estate — Bank asserted priority under ss. 20(1)(b) and 20(2)(b) of PPSA over tax refund and some undistributed funds on basis that bank's security interest was perfected on date when receiver was appointed — Trustee in bankruptcy argued that relevant date for determining priority was date of assignment into bankruptcy and on that date, bank's security interest was unperfected as against trustee and ranked as unsecured creditor — Trustee sought direction of court on priority issue — Motion judge dismissed bank's claim on basis that s. 47 Bankruptcy and Insolvency Act ("BIA") receiver was not person who represents creditors of debtor under s. 20(1)(b) of PPSA — Motion judge found that appointment order did not exempt bank from complying with PPSA by filing financing change statement within 30 days of learning that debtor's name was sold, nor did stay provisions of order prevent bank from seeking to lift stay in order to file financing change statement — Bank appealed — Appeal dismissed — Bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b) — Motion judge was correct that receiver was not representative of creditors within meaning of ss. 20(1)(b) and 20(2)(b) — Bank's security interest became unperfected as result of s. 48(3) of PPSA and because it did not re-perfect its security interest before assignment of debtor into bankruptcy — Bank's security interest was perfected on date of appointment of trustee and its security interest was therefore ineffective against trustee — Bank lost its priority over other creditor that also lost its secured standing and both creditors were unperfected on date of appointment of trustee and both their security interests were ineffective against trustee.

The bank held a first registered general security interest over the personal property of the debtor and sought to enforce its security by seeking the appointment of an interim receiver under s. 47(1) of the Bankruptcy and Insolvency Act ("BIA"). A court order appointing P Inc. as interim receiver was issued. Following its appointment, the interim receiver sold the substantial assets of the debtor in three sales. In accordance with the vesting orders of the court, the interim receiver distributed the proceeds of the first two sales to the creditors according to their respective priorities at the time of the sales. As part of the first sale, the receiver sold the debtor's name triggering s. 48(3) of the Personal Property Security Act ("PPSA"). Both the bank and a subsequent secured creditor had knowledge of the sale of the debtor's name and failed to register a financing change statement. P Inc. subsequently assigned the debtor into bankruptcy and P Inc. was appointed trustee in bankruptcy of the debtor's estate. Following the assignment, the trustee in bankruptcy received a substantial income tax refund. The bank asserted a first priority right to the income tax refund and some other funds held by the trustee by filing a proof of claim with P Inc. as trustee in bankruptcy. In response, the trustee in bankruptcy brought a motion for the advice and direction of the court as to whether the bank's security interest, which was unperfected at the date of the bankruptcy, remained effective against it as trustee. The motion judge held that the appointment order did not have the effect of precluding the bank from maintaining the perfected status of its security interest following the appointment of the interim receiver. The motion judge concluded that the bank's security interest became unperfected. The motion judge found that a s. 47 BIA receiver was not a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and s. 20(20(b) of the PPSA. The motion judge held that P Inc. only became a person who represents the creditors of of the debtor upon its appointment as trustee in bankruptcy. Because at that time the bank's security interest was unperfected, it was and remained ineffective against the trustee from that date. The bank appealed.

Held: The appeal was dismissed.

Per Feldman J.A. (LaForme J.A. concurring): The bank's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against the trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b). The motion judge was correct that a receiver is not a representative of creditors within the meaning of ss. 20(1)(b) and 20(2)(b) and the term "receiver" should not be read into the legislation. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the collateral and obtains no priority rights under ss. 20(1)(b) or 20(2)(b) in the collateral, or in respect of the collateral, and thus is not a priority contest with any creditor on behalf of unsecured creditors. The effect of ss. 20(1)(b) and 20(2)(b) is to determine the priority rights of creditors at a particular time, but not to freeze priorities for all time. Neither these subsections nor the order appointing the interim receiver had the effect of exempting the bank from the requirement of complying with s 48(3). Because it also failed to re-register under s. 30(6) before the debtor's assignment into bankruptcy, the bank's security interest was not effective against the trustee in bankruptcy. Because the bank's security interest became unperfected as a result of the operation of s. 48(3), and because it did not re-perfect its security interest before the assignment of the debtor into bankruptcy, it was perfected on the date of the appointment of the trustee and its security interest was therefore ineffective against the trustee. The bank lost its priority over the other creditor that also lost its secured standing and they were both unperfected on the date of the appointment of the trustee and both their security interests were therefore ineffective against the trustee.

Per Weiler J.A. (dissenting): The motion judge was correct in holding that the appointment order did not give the bank an implied exemption from complying with the requirement to file financing change statement upon learning that the receiver sold the debtor's name. The bank could have applied to the court to obtain the receiver's consent to lift the stay or to file the requisite PPSA registration. The motion judge erred in concluding that the interim receiver was not a person who represents the creditors of the debtor within the meaning of s. 20(1)(b). In light of the wording of and history of the section, the opinion of scholars, the existing jurisprudence, and having regard to the section as a whole, to related provisions, and to the purpose of the section, P Inc.'s appointment as a s. 47 BIA receiver made it a person who represents the creditors of the debtor. The motion judge was incorrect in concluding that the s. 47 BIA receiver was effectively a representative of the bank alone. The receiver owed a fiduciary duty to all the creditors and had vast powers over the property of the debtor. The motion judge's conclusion that the rights referred to in s. 20(2) were proprietary rights akin to those exercised by the trustee in bankruptcy ignored the fact that the PPSA was not about title to property or rights against the debtor, but was about notice to and priorities between creditors. Pursuant to s. 20(2), the time for determination of priorities was the date of the receiver's appointment, and on that date, the bank had properly perfected its first security interest. The s. 47 BIA receivership did not end when the trustee in bankruptcy was appointed. Although the bank was not exempt from its obligation to file a financing change statement or a fresh financing statement upon learning of the debtor's name change, its failure to do so did not result in loss of its priority. The date for determining the effectiveness in the bank's security interests was when the court appointed the interim receiver and this date for determining priorities did not change with the appointment of the receiver as a trustee in bankruptcy.

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APPEAL by creditor from decision reported at *1231640 Ontario Inc., Re* (2006), 23 C.B.R. (5th) 92, 2006 CarswellOnt 4406 (Ont. S.C.J.), dismissing creditor's claim to priority under *Personal Property Security Act*.

***K.M. Weiler J.A.* (Dissenting in Part):**

Introduction

1 This appeal concerns a priority dispute between two creditors of an insolvent company, The State Group Limited (now 1231640 Ontario Inc. but referred to here as "State"), over funds totalling approximately $5.5 million. The majority of the disputed amount resulted from an income tax refund to State of approximately $4.5 million.

2 The priority dispute requires a consideration of the role of a receiver appointed by the court pursuant to s. 47 of the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). It

also requires the court to interpret the phrase "a person who represents the creditors of the debtor" in s. 20(1)(b) and the phrase "rights of a person....in respect of the collateral" in s. 20(2)(b) of the provincial *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*").

3 On one side of the priority dispute is the appellant, the Royal Bank of Canada ("the Bank"), which acted as the administrative agent for a syndicate of lenders to State. The loan was secured by a general security agreement. All parties agree that the terms of the general security agreement between the Bank and State cover all the assets of State, including the tax refund. On the other side of the dispute is the respondent, St. Paul Guaranty Insurance Company ("St. Paul"). St. Paul also holds a general security agreement over all of the assets of State, which would include the tax refund. In the middle is PricewaterhouseCoopers Inc. ("PWC"), who acted as both the s. 47 *BIA* receiver and as the trustee in bankruptcy.

4 At this juncture, it may be helpful to provide a brief overview of the priority regime established by the *PPSA*. The *PPSA* creates a regime that enables creditors to record written agreements giving them a security interest in a debtor's property, known as "collateral".[1] A security interest is not enforceable against a third party unless the requirements of the *PPSA* are met.[2] Because multiple secured creditors can acquire security interests in the same collateral, the concept of "perfection" is used to order the priorities among them. The basic rule is that perfected security interests have priority over those that are unperfected. One method of perfection is for the creditor to take actual possession of the collateral.[3] The most common method of perfection, however, is by registration of a financing statement in the Ontario Personal Property Security Registry ("PPSR"). Generally, the first person to register has a first priority secured interest that is effective against third parties, including other secured parties.[4] Perfection may last as long as the period chosen for registration lasts, generally some time longer than the length of the security agreement, or until there is a change affecting the collateral.

5 In this case, the Bank had a first priority secured interest. St. Paul's security interest was registered after the Bank's and thus was subordinate to that of the Bank.

6 On November 14, 2001, the Bank obtained a court order appointing PWC as an interim receiver pursuant to s. 47 of the *BIA* ("Appointment Order").[5]

7 A s. 47 *BIA* receiver is appointed by the court when a debtor is insolvent and a creditor gives notice that it intends to enforce its security pursuant to s. 244 of the *BIA*. The applicant creditor must satisfy the court that the appointment of the receiver is necessary to protect the debtor's estate or the interest of the creditor who sent the s. 244 notice. Thus, the receiving order is not made in the context of an application for a bankruptcy order or in a situation where the debtor seeks to avoid bankruptcy by making a proposal to its creditors. The appointment is for "such term as the court may determine" and allows the receiver to take possession of the debtor's property that is subject to the security interest, to exercise control over it, and to take

such action as the appointment order provides. The appointment order usually provides, as this order does, that third parties are prevented from taking or continuing any legal proceedings against the debtor without leave of the court.

8 Pursuant to the Appointment Order allowing it to do so, PWC sold State's name on November 14, 2001. The next day, the name of the debtor company was changed to 1231640 Ontario Inc. Section 48(3) of the *PPSA* provides that if the secured creditor learns that the debtor has changed its name, the secured creditor's interest in the collateral becomes unperfected unless the secured creditor takes possession of the collateral[6] or files a financing change statement giving the new name of the debtor within thirty days.[7] If the secured creditor fails to file a financing change statement within thirty days, it can reperfect its interest by filing a fresh financing statement.[8]

9 The Bank conceded that it would have been aware of State's name change at least by the time PWC made a second sale of State's assets on December 6, 2001. The Bank did not file, or seek leave of the court to file, a financing change statement within thirty days of becoming aware of the name change, nor did it file a fresh financing statement after that date. St. Paul also filed nothing. The proceeds of the December 6, 2001 sale and a further sale on December 24, 2001 are not in dispute on this appeal.

10 The Appointment Order permitted PWC to assign State into bankruptcy, which it did on January 31, 2002. By this date, the previously perfected security interests of both creditors had become unperfected.

11 Following the assignment into bankruptcy, PWC received the income tax refund owing to State in the amount of approximately $4.5 million. The Bank claimed that it was entitled to the proceeds because when PWC was appointed a receiver on November 14, 2001, it had a properly perfected first security interest. St. Paul contended that the relevant date for determining priorities was the date that PWC was appointed trustee in bankruptcy, *i.e.*, January 31, 2002, and that as of this date, the Bank had lost its priority because it had failed to file a financing change statement as required by s. 48(3) and had also failed to file a fresh financing statement thereafter. PWC sought the direction of the court on the priority issue.

12 Before the motion judge, the Bank argued that it was implicitly exempted from having to file a financing change statement as required by s. 48(3) of the *PPSA* in light of the terms of the Appointment Order. In the alternative, the Bank argued that because its security interest was perfected at the time of PWC's appointment as receiver, it did not lose its priority because a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. Since s. 20(2)(b) provides that "[t]he rights of a person... under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect", the relevant date for determining the priority dispute is the date of the receiver's appointment. At that date, the Bank's security interest was perfected and

the Bank's failure to make a further filing when PWC sold State's name did not result in a loss of its priority.[9]

13 The motion judge rejected both of the Bank's arguments. He concluded that the November 14, 2001 court order appointing PWC as interim receiver did not have the effect of exempting the Bank from having to comply with s. 48(3) of the *PPSA* by filing a financing change statement within thirty days of learning that PWC had sold State's name.

14 With respect to the Bank's alternative argument, the motion judge held that PWC, as a receiver under s. 47 of the *BIA*, was not "a person who represents the creditors of the debtor" under s. 20(1)(b) of the *PPSA*, but rather was appointed for the protection of the Bank's interests. He observed that the assets of the debtor did not vest in PWC, nor did the liabilities of the debtor become PWC's liabilities, as is the case with a trustee in bankruptcy. He further held that PWC did not have the authority to settle or compromise liabilities owed to the creditors of the debtor. The motion judge reasoned that the application of the *ejusdem generis* principle of statutory interpretation applied to the interpretation of s. 20(1)(b). He held that "a person who represents the creditors of the debtor" must be of like kind or class as a trustee in bankruptcy or an assignee for the benefit of creditors. Given the distinctions he had observed between a receiver and the representatives specified in s. 20(1)(b), he held that a s. 47 *BIA* receiver is not "a person who represents the creditors of the debtor."

15 Accordingly, the motion judge concluded that pursuant to s. 20(2)(b), the effective date of the appointment of a person with representative status, and the date that the representative's rights in respect of the collateral are to be determined, is the date PWC was appointed as trustee in bankruptcy, namely January 31, 2002. At that time, both St. Paul and the Bank were unperfected secured creditors. Pursuant to the priorities under the *BIA*, as unperfected secured creditors, the Bank and St. Paul were entitled to share rateably in the income tax refund. Since the Bank's claim was for $29 million and St. Paul's was for some $88 million, the result of the motion judge's decision is that St. Paul would be entitled to the bulk of the refund.

The Issues

16 This appeal requires me to consider two issues:

1. Did the Appointment Order implicitly give the Bank an exemption from complying with s. 48(3) of the *PPSA*?

2. Did the Bank's failure to file a financing change statement or fresh financing statement result in a loss of its priority as a secured creditor?

17 On the first issue, like the motion judge, I conclude that the obligation to make filings under the *PPSA* continued and that the Appointment Order did not exempt the Bank from complying with s. 48(3) of the *PPSA*. My colleagues agree.

18 My colleagues and I disagree on the answer to the second question, whether the Bank lost its priority as a secured creditor. The answer depends on the date chosen for the determination of priorities. If, as I conclude, a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, then in light of the combined operation of ss. 20(1)(b) and 20(2)(b), the relevant date for determining the Bank's priority status is the date of the appointment of PWC as interim receiver. On that date, the Bank's security interest was perfected and had priority over that of St. Paul.

19 In answering the second question, it is also necessary to address an alternative argument put forward by PWC. According to PWC, the Bank's priority status had to be determined all over again as of the date PWC was appointed trustee in bankruptcy on January 31, 2002. PWC argues that the s. 47 *BIA* receivership ended when it was appointed trustee in bankruptcy and that the s. 47 *BIA* receiver had no proprietary interest in the disputed assets. I reject PWC's position and conclude that the s. 47 *BIA* receivership did not end with PWC's appointment as trustee and that the Bank retained its priority over the tax refund following State's assignment into bankruptcy by PWC.

Analysis

1. Did the Appointment Order implicitly give the Bank an exemption from compliance with s. 48(3) of the PPSA?

20 The Bank submits that to require it to comply with s. 48(3) of the *PPSA* by filing a financing change statement after it learned PWC sold State's name is inconsistent with the spirit of the Appointment Order, which had the effect of maintaining the existing priorities among creditors. The Bank also submits that exempting it from compliance with s. 48(3) does no injustice to the policy underlying the *PPSA*. The registration regime established by the *PPSA* is intended to provide a means of giving notice to interested parties of existing security interests in the debtor's property so that they can govern their dealings with the debtor accordingly. Interested parties can search the PPSR against the debtor's name for existing registrations against that debtor and its collateral. Although the *PPSA* requires that the debtor's name must appear correctly on a registration in order for that registration to be effective, the policy reason for requiring a secured creditor to maintain the perfection of its security interest disappears on a s. 47 *BIA* receivership. Under that type of receivership, the secured creditor is in the process of enforcing its security and the debtor is deprived of possession of its property and is not in a position to grant further security interests.

21 The Bank further argues that to require it to comply with s. 48(3) would effectively require it to act in a manner that is contrary to the wording of the Appointment Order. The Bank relies on s. 7 of the order appointing PWC, which stays any "legal proceeding, enforcement process, extra-judicial proceeding or other proceeding against or in respect of the Debtor or the Property". Similarly, s. 8 of the Order restrains the enforcement or exercise of certain rights, including registration, against the debtor or the property. The Bank argues that these provisions prevented it from registering a financing change statement.

22 The motion judge rejected the Bank's submissions. He held that even if the Bank was correct that the policy considerations requiring registration were no longer applicable in the circumstances, the court could not override the provisions of the legislation unless there was a legislative gap, which he concluded there was not. Insofar as the Appointment Order was concerned, he held that even if the filing of a financing change statement was a "proceeding" that was stayed under s. 7 or restrained under s. 8, the Bank could have applied to lift the stay and the court would likely have allowed the application. Thus, the terms of the Order did not preclude the Bank from filing the required financing change statement to maintain its perfected status prior to the assignment in bankruptcy.

23 The motion judge's approach was intended to protect the integrity of the registration requirements of the *PPSA*. I agree that nothing in the Appointment Order or in the *PPSA* exempts the Bank from having to comply with the filing requirements of the *PPSA*. As indicated by the motion judge, if the filing of a financing statement was a "proceeding" that was stayed by the Appointment Order, an application to lift the stay would likely have been successful since no other creditor would be prejudiced. The reason that an application to lift the stay would likely be successful even after the expiry of the thirty day period for filing a financing change statement is reinforced by the existence of s. 30(6) of the *PPSA*. That subsection permits re-registration of a security interest that has become unperfected.[10] See *PSINet Ltd., Re*, [2002] O.J. No. 271 (Ont. S.C.J. [Commercial List]).

24 Alternatively, instead of bringing an application to lift the stay for the limited purpose of allowing it to either maintain or to reperfect its security interest, s. 31 of the Appointment Order provides that any interested party may apply to vary or amend the order on seven days notice. The Bank could thus have applied to the court to amend the initial Appointment Order so as to enable the Bank to obtain the receiver's consent to lifting the stay or to filing the requisite *PPSA* registration.

25 I note that the *Standard Template Receivership Order* ("the Model Order") prepared by a subcommittee of the Commercial List Users Committee in conjunction with the Canadian Bar Association Insolvency section contains standard language ordering that all rights and remedies against the debtor, the receiver, or affecting the property are stayed except with leave of the court or "except with the written consent of the Receiver" and further that nothing shall "prevent

the filing of any registration to preserve or perfect a security interest." The wording of the Model Order provides further support for my conclusion that the motion judge was correct in holding that the Appointment Order did not give the Bank an implied exemption from complying with the requirement to file a financing change statement as required by s. 48(3) upon learning that PWC had sold State's name.

2. Did the Bank's failure to file a financing change statement result in a loss of its priority as a secured creditor?

26 The resolution of this issue requires me to determine whether a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*, as well as to interpret the meaning of the words "rights of a person" in s. 20(2).

27 For ease of reference, the relevant portions of s. 20 are as follows:

> 20 (1) Except as provided in subsection (3),[11] until perfected, a security interest,
>
> . . . . .
>
> (b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;
>
> . . . . .
>
> (2) The rights of a person,
>
> . . . . .
>
> (b) under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

28 The Bank submits that the motion judge erred in holding that an interim receiver appointed by the court under s. 47 of the *BIA* is not "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. If the receiver is a "person" within the meaning of s. 20(1)(b), then the date for determining the parties' priorities is the date that PWC was appointed as a s. 47 *BIA* receiver. On that date, the Bank had a properly perfected security interest.

29 St. Paul's position is that the motion judge was correct in holding that an interim receiver is not a "person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The trustee in bankruptcy, not the s. 47 *BIA* receiver, is the representative of the creditors and the date for determining priorities is the date of the trustee's appointment. On that date the Bank did not have a properly perfected security interest. In the alternative, St. Paul

agrees with the position of PWC.

30 PWC agrees with the Bank that an interim receiver is a representative of the creditors for the purposes of s. 20(1)(b). However, PWC submits that even if the Bank's security interest was effective as against the interim receiver, once the estate funds vested in the trustee in bankruptcy, the interim receivership ended. The relevant date for determining the effectiveness of the Bank's security interest then became January 31, 2002, when its status as trustee in bankruptcy took effect. As of January 31, 2002, the Bank's security interest was no longer perfected. The Bank responds that the receivership and the bankruptcy are not two separate processes, but one continuous process and that the date for determining priorities did not change when the trustee in bankruptcy was appointed.

31 I first confront the issue of whether a s. 47 *BIA* interim receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). In my view, the motion judge erred in concluding that an interim receiver is not such a person. In reaching this conclusion, I am guided by the following considerations:

(a) the relevant principles of statutory interpretation;

(b) the history of the legislative provision and the view of commentators on the meaning of s. 20(1)(b);

(c) the fiduciary role and the powers of the s. 47 *BIA* receiver;

(d) the word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession;

(e) the overall scheme of the *PPSA*, including s. 20 as a whole and s. 30(6); and

(f) the purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed.

32 I now discuss each of these considerations supporting my conclusion that a s. 47 *BIA* receiver is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). I will then go on to address PWC's alternative argument.

(a) The relevant principles of statutory interpretation

33 Section 20(1)(b) renders any security interest in the debtor's collateral ineffective against "a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy" until that security interest is perfected. All provinces have legislation governing priorities between and among secured and unsecured creditors.[12] However, no other province uses the general words, "a person who represents the creditors of the debtor" as found in s. 20(1)(b) of the Ontario legislation. The *PPSA* does not define "a person who represents the creditors of the debtor". Consequently, resort must be had to ordinary principles of statutory interpretation to determine the meaning of this phrase.

34 The prevailing approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." See R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths, 2002) at p. 1; *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26. In order to maintain harmony within the scheme of the Act, the same word must consistently be given the same meaning throughout a statute. See Sullivan, *supra*, at p. 163; *Thomson v. Canada (Department of Agriculture)*, [1992] 1 S.C.R. 385 (S.C.C.). The principle is also one of the Drafting Conventions adopted by the Uniform Law Commission of Canada in s. 21(5) and s. 34(2). See Sullivan, *supra*, Appendix I at pp. 619, 623. The ordinary meaning of legislation is "the natural meaning which appears when the provision is simply read through". See Sullivan, *supra*, at p. 21; *Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.*, [1993] 3 S.C.R. 724 (S.C.C.) at 735.

35 Words take their meaning from the context in which they are found. Thus, in interpreting a statutory provision, among the considerations to which the court will have regard are the immediate context of the words in the section, any adjacent and closely related provisions, the Act as a whole, the history of the legislation and other external sources. See Sullivan, *supra*, at pp. 261-62.

(b) Having regard to the history of the legislative provision, a s. 47 BIA receiver is not excluded from being "a person who represents the creditors of the debtor"

36 The predecessor version of the *PPSA* included a receiver in the list of persons who represent the creditors of the debtor. Section 22 of the *Personal Property Security Act*, R.S.O. 1980, c. 375, stated:

> 22 (1) Except as provided in subsection (3),[13] an unperfected security interest is subordinate to,
>
> (a) the interests of a person,

.....

(iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...

.....

(2) The rights of a person under subclause (1)(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the security interest.

The question is, therefore, whether the removal of the word "receiver" from the current version of the Act, and the substitution of the word "includes" for the word "as" indicates that the legislature intended to exclude an interim receiver from the category of persons referred to in the section.

37 In my opinion, the removal of the word "receiver" is not indicative of any legislative intention to exclude receivers appointed under s. 47 of the *BIA* from the category of persons included under s. 20(1)(b). I say this for four reasons.

38 First, the earlier version of the *PPSA* was limitative, not expansive. The use of the word "as" in the phrase "a person who represents the creditors of the debtor *as* assignee ... trustee in bankruptcy, or receiver" meant that only the three categories of persons mentioned were included: see R. McLaren, *Secured Transactions and Personal Property in Canada*, 2nd ed., looseleaf (Toronto: Carswell, 1989) at pp. 5-160 to 5-161.

39 What the legislature intended to do and did do in amending s. 20(1)(b) was to expand the category of persons representing the creditors of the debtor. The word "including" in the current legislation is a term of extension. See Sullivan, *supra*, at p. 181; see also *National Bank of Greece (Canada) c. Katsikonouris*, [1990] 2 S.C.R. 1029 (S.C.C.) at 1041, where LaForest J. wrote that the word "including" is normally "designed to enlarge the meaning of preceding words, and not to limit them." Accordingly, the examples that follow the word "including", namely, an assignee for the benefit of creditors and a trustee in bankruptcy, are not meant to be exhaustive. Further, an interpretation of legislation that narrows the scope of general words so that there is nothing but the enumerated items to which they can apply must be rejected. See Sullivan, *supra*, at p. 179. Limiting the meaning of s. 20(1)(b) to an assignee for the benefit of the creditors and a trustee in bankruptcy would leave no other persons to whom the general words, "a person who represents the creditors of the debtor" could apply.

40 Second, there is a presumption against implicit alteration of law. The legislature is presumed not to change existing law or to depart from established practices beyond that which is expressly stated. Failing to explicitly alter the law results in the law remaining undisturbed. See

Sullivan, *supra*, at pp. 395-96. The legislature would have had to use more precise language to exclude all receivers from the category of persons "who represent the creditors of the debtor" if it wished to have done so.

41 Third, the commentary of Mr. Fred M. Catzman, Q.C., the former chair of the Attorney General's advisory committee on the *PPSA*, lends some insight into why the term "receiver" was removed from the current legislation. In reference to the previous legislation, he stated that the term "receiver" is a generic term and, in his opinion, whether the receiver represented the interests of the creditors depended on whether the receiver was appointed by court order. If appointed by private agreement, the receiver represented only the interests of the creditor appointing it. See F. M. Catzman *et al.*, *Personal Property Security Law In Ontario* (Toronto: Carswell, 1976) at p. 114. Where, as here, legislative change is preceded by a report of a person or body that has investigated a condition and made a recommendation, the courts are entitled to take judicial notice of it. While the commentary cannot be used as direct evidence of legislative intent, the court may use it to draw inferences about the meaning of particular provisions. See Sullivan, *supra*, at pp. 484-85. Removing the word "receiver" was intended to exclude a privately-appointed receiver, whose role is to protect the interests of a single secured creditor, from the class of persons contemplated by s. 20(1)(b).

42 Fourth, the interpretation of legal scholars with expertise in the particular statute under consideration has become an authoritative source for consideration by courts. See Sullivan, *supra*, at p. 502. The unanimous opinion of academics and other commentators respecting s. 20(1)(b) is that the phrase "a person who represents the creditors of the debtor" is not limited to assignees or trustees in bankruptcy. In *The Ontario PPSA Commentary and Analysis* (Markham, Ont.: Butterworths, 2000) at p. 163, under the heading "Trustee in bankruptcy and other representative creditors", Jacob S. Ziegel and David L. Denomme write in reference to s. 20(1)(b):

> It is clear from the structure of clause (b) that it is not meant to be confined to an assignee for the benefit of creditors and a trustee in bankruptcy but also covers other creditors' representatives.

43 Frank Bennett states in *Bennett on the PPSA (Ontario)*, 3rd ed. (Markham, Ont.: Butterworths, 2006) at p. 53:

> .... even though there is no reference to a receiver in s. 20(1), it is clear that a court-appointed receiver comes within the subsection... The court-appointed receiver is an officer of the court with fiduciary duties to *all* creditors and the debtor although its appointment was initiated by the secured party.

[Emphasis added.]

Richard McLaren writes in *Secured Transactions and Personal Property in Canada*, *supra*, at p. 5-162:

> A receiver is not listed in the revised Act [R.S.O. 1990, c. P.10] as a type of creditor's representative, but it is likely that court-appointed receivers will still qualify as a representative of creditors. Receiver is a generic term describing a person having the attributes characteristic of a receiver in chancery: one must be an officer judicially appointed and responsible to the court with the object of preserving property pending litigation to decide the rights of the parties. Once appointed by the court, the receiver is answerable to the court and to all interested parties. Given the cited case law decisions on the characteristics of a receiver, a liquidator under the *Winding-Up and Restructuring Act*, the *Business Corporations Act* or the *Bank Act* would qualify as a receiver.
>
> Given that privately-appointed receivers only represent one or some of the creditors and that they are not judicially appointed, it has been held that they do not come within the ambit of s. 20(1)(b). [Citations omitted.][14]

44 I am not aware of any scholarly opinion to the contrary. The unanimous opinion of scholars appears to be that the phrase used in s. 20(1)(b), "a person who represents the creditors of the debtor", is not limited to an assignee or trustee in bankruptcy. Further, in the opinion of two of the authors cited above, the phrase includes a court-appointed receiver.

(c) The fiduciary role and powers of the s. 47 BIA receiver

45 The motion judge concluded that a receiver appointed by the court under s. 47 of the *BIA* is effectively the representative of the Bank alone. In my opinion, his conclusion on this issue is in error. A s. 47 *BIA* receiver owes a duty to all of the creditors of the debtor.[15] For example, a s. 47 *BIA* receiver was described by Cumming J. in *Ravelston Corp., Re*, [2007] O.J. No. 414 (Ont. S.C.J. [Commercial List]), aff'd (2007), 85 O.R. (3d) 175 (Ont. C.A.), as an officer of the court, who owes a duty not only to the court, but also to all persons interested in the debtor's assets, property and undertakings. These duties must be carried out honestly and in good faith. The receiver's role, like that of a trustee in bankruptcy, is "that of a fiduciary to all interested stakeholders." He concluded at para. 67:

> A court-appointed receiver under the *BIA* or [*Courts of Justice Act*], as with a trustee in bankruptcy under the *BIA*, has a duty to impartially represent the interests of all creditors, the obligation to act even-handedly, and the need to avoid any real or perceived conflict between the receiver's interest in administering the estate and the receiver's duty,

[Citations omitted.]

46 In addition to the fiduciary relationship to all creditors, the s. 47 receiver typically has vast powers over the property of the debtor and performs functions similar to those of a trustee in bankruptcy, albeit without relying on a change in the locus of title. The powers of the s. 47 receiver were discussed by Farley J. in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, [1994] O.J. No. 953 (Ont. Gen. Div. [Commercial List]). At para. 3, Farley J. noted how amendments to the *BIA* in 1992 had affected the rights of secured creditors by the requirement in s. 244 to give notice to the debtor of an intention to enforce its security and to refrain from taking action for ten days, but providing for the remedy of a s. 47 receiver.

47 After quoting the provisions of s. 47, and noting that the interim receivership in *Curragh* had continued for much longer than ten days, Farley J. observed that the object of the s. 47 receivership process appeared to be to maintain the mining property in question, while marketing it with a view to selling it, and that the s. 47 receivership would likely continue until the mine was sold. He concluded that "it would seem that in many practical aspects in these circumstances that the [interim receiver] is functioning as a quasi-receiver and manager/trustee in bankruptcy." He pointed out that the 1992 amendments to the *BIA* dealt more extensively with insolvency as contrasted with bankruptcy and that pre-amendment cases dealing with the powers of the interim receiver had to be analyzed with care.[16] Farley J. concluded that the regime providing for the appointment of a s. 47 *BIA* receiver was flexible and that the court could allow the interim receiver to exercise control over the business in question as opposed to limiting its powers for narrow purposes such as the sale of perishable goods. In addition, he observed at para. 6 that because s. 47(2)(c) allows the interim receiver to apply to the court for directions, "it would appear that these directions should be tailored to meet the practical demands of the situation which are being encountered in any given case."

48 In deciding whether the s. 47 receiver falls within s. 20(1)(b), it is also relevant to consider that such a receiver has exclusive control over the assets and affairs of the company and, in this regard, the receiver displaces the board of directors and the company's managers: *Toronto Dominion Bank v. Fortin* (1978), 85 D.L.R. (3d) 111 (B.C. S.C.) at 113; *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 75 (Sask. Q.B.). Further, the s. 47 receiver has the power to settle liabilities and can be a successor employer, that is, it can stand in the shoes of the owner towards the employees of the company: *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2006] 2 S.C.R. 123 (S.C.C.). In addition, s. 47(2)(c) of the *BIA* empowers the interim receiver to "take such other action as the court considers advisable."

49 Frank Bennett, in *Bennett on Bankruptcy*, *supra*, at p. 119-20, contrasts the appointment of a s. 47 interim receiver with that of receivers appointed in the context of an application for a

bankruptcy order under s. 46 or pending the proposal process under s. 47.1 of the *BIA* as follows:

> There does not appear to be any limitation on this appointment. There is no defined end of the interim receivership and the word "interim" is clearly a misnomer of the receiver's powers and duties that are more akin to a court-appointed receiver and manager under provincial legislation.

50 As these cases illustrate, the role played by the s. 47 *BIA* receiver is akin to that of a trustee in bankruptcy in the sense that the s. 47 *BIA* receiver owes a fiduciary duty to all of the creditors and typically has vast powers over the property of the debtor. Furthermore, as in a bankruptcy, the exercise of the s. 47 *BIA* receiver's powers and duties is overseen by the court to ensure that the creditors of the debtor are not prejudiced.

51 My colleague Feldman J.A. cites the case of *TRG Services Inc., Re*, [2006] O.J. No. 4521 (Ont. S.C.J.), in which it was held that a monitor under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, is not a representative of creditors within the meaning of s. 20(1)(b) of the *PPSA*. The role of a court-appointed s. 47 *BIA* receiver stands in sharp contrast to that of a court-appointed monitor. A monitor's powers are limited and a court-appointed monitor does not stand in the shoes of the company nor owe fiduciary duties to creditors. See *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.) at paras. 49-50, leave to appeal to S.C.C. granted, (2007) (S.C.C.).

(d) The word "rights" in s. 20(2) means more than title or ownership rights and includes the right to possession

52 A person "who represents the creditors of the debtor" under s. 20(1)(b) must be a person exercising rights, because s. 20(2) refers to the time when "[t]he rights of a person... in respect of the collateral under clause 1(b)" are to be determined. The *PPSA* does not define the word "rights" or the phrase "rights of a person...in respect of the collateral". In my opinion, the word "rights" in the *PPSA* is used more broadly than referring to title alone.

53 The motion judge was of the opinion that the rights referred to in s. 20(2) are proprietary rights akin to those exercised by a trustee in bankruptcy. He concluded that a receiver is not the type of representative of creditors included in s. 20(1)(b) because, unlike with the trustee in bankruptcy, title to the debtor's assets does not vest in a s. 47 *BIA* receiver. In my opinion, the motion judge erred in interpreting the word "rights" in s. 20(2) as meaning proprietary rights limited to the traditional concepts of title and ownership.

54 The motion judge's conclusion ignores the fact that the *PPSA* is not about title to property or rights against the debtor, but is about notice to and priorities between creditors. In *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.) at para. 28, Iacobucci J. was critical of the British Columbia Court of Appeal's approach to a priority dispute under the B.C. *Personal Property Security Act* because that court "did not look past the traditional concepts of title and ownership." He held that the dispute could not be resolved through the determination of who had title because the dispute was one of priority to the collateral and not ownership in it.

55 As noted by Tamara M. Buckwold and Ronald C.C. Cuming in their article, cited with approval in *Giffen, supra* at para. 26, "The Personal Property Security Act and the Bankruptcy and Insolvency Act: Two Solitudes or Complementary Systems?" (1997) 12 B.F.L.R. 476 at 470:

> The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title. Rather, they are defined by the [Personal Property Security] Act itself.

56 Other legal scholars have made similar comments. In *2006 Ontario PPSA & Commentary*, (Markham, Ont.: Butterworths, 2006) at p. 3, editors Jennifer G. Legge and Daphne J. MacKenzie explain that "neither the application [of the Act] nor priority contests among creditors with an interest in personal property collateral are governed by title." In his *2008 Annotated Ontario Personal Property Security Act, supra* at p. 247, Richard McLaren states in regard to the general priority rules that are to be applied if no other provision of the Act is applicable: "The general priority scheme set up in s. 30(1) disregards the pre-Act law and its reverence for legal title in collateral."[17] By focusing on where title was held in interpreting s. 20(1)(b), the motion judge ignored the overall context of the *PPSA*.

57 I am of the opinion that the phrase "rights of a person" in s. 20(2) refers to the entitlement of the person under s. 20(1)(b) to exercise its powers, such as the power to take possession of the debtor's assets. In *Giffen, Re, supra*, Iacobucci J. held at para. 34 that the right to possession is a right to property or a proprietary right under the *BIA*. He stated: "In my opinion, the bankrupt's right to use and possession of the car constitutes 'property' for the purposes of the *BIA*..."[18]

58 This interpretation of "rights of a person" in s. 20(2) is also in harmony with the use of the phrase "rights" in other sections of the *PPSA*, as well as scholarly comment on the word "rights" as used in the *PPSA* context.

59 Although title to a debtor's property does not vest in a receiver, s. 60(1) of the *PPSA* states:

> 60. (1) Nothing in this Act prevents,
>
> (a) the parties to a security agreement from agreeing that the secured party may appoint a receiver or receiver and manager and, except as provided by this Act, determining the *rights* and duties of the receiver and manager by agreement [Emphasis added.]

As the word "rights" is specifically used in relation to receivers in s. 60(1), the argument that "person" in s. 20(2) must have proprietary rights akin to those of a trustee in bankruptcy cannot succeed.

60 Zeigel and Denomme also discuss the word "rights" in relation to one of the prerequisites for attachment under s. 11 of the *PPSA*: that the debtor have "rights" in the collateral. See *The Ontario PPSA Commentary and Analysis*, *supra*, at pp. 124-27. They begin by saying that the section merely states the obvious, namely, that if the debtor has no "rights" in the collateral, the debtor has nothing to give as security to the creditor. One subheading asks the question: "Is it sufficient that the debtor only has a 'power' to transfer rights in the collateral?" The authors conclude that the power to vest a good title in the goods of a third party is a sufficient right to create a security interest. They also ask the question whether anything turns on the distinction between "power" and "rights" and conclude at p. 127 that nothing turns on the distinction:

> "Rights" is used elliptically in paragraph [11(2)(c)] to describe collateral to which the secured party's security interest is capable of attaching, and is not concerned with the purity of the debtor's title.

61 In addition, under s. 1 of the *PPSA*, a "debtor" is defined as: "a person who ... owns or has rights in the collateral, including a transferee of or a successor to a debtor's interest in collateral." The construction of this definition makes it clear that the word rights has a broader meaning than ownership.

62 I would adopt the same approach to interpreting the word "rights" in s. 20(2). In my opinion, the phrase "a person who represents the creditors of the debtor" is not limited to persons with the same proprietary rights in the collateral as an assignee for the benefit of creditors and a trustee in bankruptcy, but includes a receiver appointed by the court pursuant to s. 47 of the *BIA* who has the right to take possession of the collateral and the right to sell it. If "rights" in s. 20(2) were read as only referring to ownership rights, then the phrase "including" in s. 20(1)(b) would have no significance because only the named representatives hold title in the debtor's collateral. My interpretation of the word "rights" in s. 20(2) as referring to the receiver's rights to possess and sell the debtor's collateral gives effect to the phrase "including" in s. 20(1)(b).

(e) The overall scheme of the PPSA including s. 20 as a whole and s. 30(6)

63 In *The Ontario PPSA Commentary and Analysis*, *supra*, at pp. 170-71, Ziegel and Denomme consider what happens when a properly perfected security interest becomes unperfected, or in other words, when it lapses. After noting that the current s. 20 does not deal with the question of what happens to a lapsed registration, the authors say that the question would have been resolved in favour of the secured party whose perfected interest had lapsed, for a number of reasons. One reason is that under the pre-PPSA statutes, the lapsed registration did not affect the validity of pre-lapse interests. The underlying reason was that priority between competing consensual interests was determined on the basis of a reliance theory. The authors then consider what the approach to priorities would be under the current s. 20(1)(b). They note that one of the arguments in favour of not giving any effect to the lapsed interest is to protect the integrity of the registration system. In opposition to this position, they note that in ss. 20(1)(c) and (d),[19] the general rule that a security interest is not effective until perfected only applies where there is a transferee for value who does not know of the security interest at the time of the transfer.

64 The authors conclude that the argument in favour of subordinating lapsed interests in determining priorities so as to protect the integrity of the registration system is further undermined by s. 30(6) of the *PPSA*.[20] Under that section, a secured creditor may reperfect a security interest in the debtor's collateral that was perfected but has become unperfected. The effect of reperfecting is to restore the secured creditor to the position it had prior to becoming unperfected, subject only to the rights of a person acquired during the period of unperfection. There is no time limit for reperfecting in s. 30(6) and Ziegel and Denomme consider the reperfection requirement to be little more than a formality that "might as well be dispensed with." These provisions show that when a previously perfected security interest lapses, the integrity of the registration system is not the ultimate value to be protected.

65 As mentioned, s. 30(6) of the *PPSA* also contains an exception. The exception is "...that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period." Use of the generic word "person" encompasses legal entities other than a secured or unsecured creditor. See Ziegel and Denomme, *supra*, at p. 259. Since the word "rights" in the *PPSA* has a broader meaning than proprietary rights and is to be given a consistent meaning throughout the *PPSA*, the reference to "rights in all or part of the collateral during the period when the security interest was unperfected" includes the rights in the collateral acquired by the s. 47 *BIA* receiver to take possession of a debtor's property and to sell it. On my interpretation of s. 30(6), if St. Paul had attempted to reperfect its security interest by registering a fresh financing statement after the appointment of PWC as a s. 47 *BIA* receiver, the exception would apply because the s. 47 *BIA* receiver acquired rights in the collateral, namely the right to possession of all present and future money and the right to sell the debtor's assets on

behalf of all creditors and distribute the proceeds. Thus, my interpretation of s. 20(1)(b) is consistent with the interpretation of rights in the collateral under other sections of the *PPSA*.

(f) The purpose of s. 20(1)(b) is to preserve the parties' relative entitlements at the time "a person who represents the creditors of the debtor" is appointed

66 The purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the creditors at the time "a person who represents the creditors of the debtor" is appointed. This conclusion flows from the Supreme Court's rulings on the relationship between provincial security interest legislation and federal bankruptcy legislation.

67 One of the clearest and most trenchant explanations of s. 20(1)(b) and its relationship to the *BIA* is found in Anthony Duggan and Jacob Ziegel's commentary on the decision of Iacobucci J. in *Giffen, Re*, *supra*. See "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007) 57 U.T.L.J. 227 at 231-34. In that case, Telecom Leasing Canada Ltd. ("TLC") leased a car to B.C. Tel, who leased it to its employee, Carol Giffen. Leases of more than one year are subject to the B.C. *PPSA* irrespective of who has title and even though the lease does not secure payment or performance of an obligation. Neither TLC nor B.C. Tel filed a financing statement. Giffen went bankrupt. Even though Giffen did not have title to the car, the Supreme Court held that pursuant to the B.C. *PPSA*, title to the car vested in the trustee in bankruptcy.

68 Commenting on this decision, Duggan and Ziegel state:

> The *PPSA* registration requirements serve a publicity function. "Public disclosure of the security interest is required to prevent innocent third parties from granting credit to the debtor or otherwise acquiring an interest in the collateral." From this perspective, s. 20(b)(1) of the *PPSA* presents a puzzle: the trustee in bankruptcy is not in the position of an innocent third party, he does not rely on the register for the purpose of any dealings with the debtor, and so he is not prejudiced by a secured party's failure to perfect a security interest. Therefore, why should an unperfected security interest be ineffective against him? According to *Giffen, Re*, [1998] 1 S.C.R. 91, the answer relates to the rights of execution creditors and the like. *PPSA* s. 20(a) provides that an unperfected security interest is subordinate to execution creditors. An execution creditor may be prejudiced by an unperfected security interest, and *PPSA* s. 20(a), provides a remedy by giving the execution creditor priority over the secured party. If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70. In effect, "the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings." *PPSA* s. 20(b)(i) is a kind of *quid pro quo*. It compensates unsecured creditors for the loss of their priority rights

under s. 20(a) by giving the corresponding priority to the trustee in the trustee's capacity as the creditors' representative. *In summary, the purpose of the PPSA s. 20 (b)(i) is "to permit the unsecured creditors to maintain, through the person of the trustee, the same status vis-à-vis secured creditors who have not perfected their security interests which they enjoyed prior to the bankruptcy of the debtor."*

. . . . .

In *Giffen, Re*, Justice Iacobucci put the case for *PPSA*, s. 20(b)(i) in fairness terms: when the debtor becomes bankrupt the execution creditor loses the priority it previously had over unperfected security interests but this is offset by giving priority to the trustee instead. However, the justification can by expressed in economic terms. The thinking goes like this: Bankruptcy creates a common pool problem, which bankruptcy law addresses by substituting a mandatory system of collective debt collection for the individual first-come, first-served debt collection system that operates outside bankruptcy. *Creditors' relative entitlements should be the same inside bankruptcy as they are outside bankruptcy because otherwise there will be incentives for individual creditors to use the bankruptcy laws opportunistically.*

[Citations omitted; emphasis added.]

69 The rationale given by Duggan and Ziegel in relation to bankruptcy applies equally whenever "a person who represents the creditors of the debtor" is appointed. When the s. 47 *BIA* receiver was appointed in this case, it was because the Bank was about to enforce its security. At that time, the Bank had a properly perfected security interest. An execution creditor would not have had any priority vis-à-vis the Bank. Because the Appointment Order stayed any actions, the execution creditor would have lost any priority it had over unperfected security interests as of the commencement of the receivership, subject to the stay being lifted by the court. Whether the *BIA* stay is imposed automatically under s. 69.3 or by court order under s. 47, the effects of the stay and the considerations it engages are similar. To prevent insolvency as well as bankruptcy laws from being used opportunistically, creditors' relative entitlements should be the same as they were immediately prior to the time "a person who represents the creditors of the debtor" was appointed.

70 Duggan and Ziegel then address the second question raised in *Giffen, Re*, namely, whether s. 20(1)(b) of the *PPSA* is in conflict with the *BIA* because of the principle of bankruptcy law that a trustee has no greater claim to property than the debtor herself had. Iacobucci J. held that the principle is not an inflexible one and that the provinces are competent to modify it as long as the modifications are not in conflict with the provisions of the *BIA*.

71 In *Giffen, Re*, Iacobucci J. did not directly address the issue of whether a conflict exists between then s. 20(b)(i) of the B.C. *PPSA* and bankruptcy policy that a trustee has no greater

claim to property than the debtor had. However, he provided a clue to his thinking at para. 52 of his reasons where he approved a statement from *Donaghy v. CSN Vehicle Leasing*, [1992] 6 W.W.R. 70 (Alta. Q.B.), to the effect that the issue is not ownership of the property but priority to it. Duggan and Ziegel state:

> From a bankruptcy perspective, what matters is not the rights a creditor may have had against the debtor herself to the disputed asset but, rather, the creditor's rights against other creditors at the moment of bankruptcy: "it is a question of priority, not property." In other words, the flaw in TLC's argument was that it focused on the wrong attribute of the property right its security interest gave it. The question is not whether TLC could have enforced its security interest against Giffen just before she went bankrupt but, rather, whether TLC would have had a priority over an execution creditor at the same point. Section 20(1)(a) of the *PPSA* determines the answer to the second question, and *bankruptcy policy dictates that bankruptcy law should preserve the parties' relative entitlements.* If this is the real meaning of the principle at stake, there is no conflict between *PPSA* s. 20(1)(b), and the bankruptcy laws. On the contrary, the provision reinforces bankruptcy policy. [Emphasis added.]

72 I take Duggan and Ziegel's reference to bankruptcy policy and bankruptcy law to be a reference to insolvency policy and law as well. Inasmuch as the purpose of s. 20(1)(b) of the *PPSA* is to preserve the relative entitlements of the parties at the time "a person who represents the debtors of the creditor" is appointed, the Bank's priority status falls to be determined at the time PWC was appointed as receiver under s. 47 of the *BIA*.

73 The purpose of s. 20 of the *PPSA* is to permit a person who takes over control of the assets or business of the debtor to distribute those assets in an orderly fashion in accordance with the existing priorities. It is for this reason that s. 20(2) determines the rights of the representative as of the date from which her status takes effect. Determining priorities at the commencement of the distribution process when the receiver assumes control over the debtor's assets is in keeping with the goals of the legislation.[21]

Conclusion on whether PWC is "a person who represents the creditors of the debtor" and the date on which the determination of priorities should be made

74 Giving effect to the unique wording of Ontario's *PPSA*; the history of the section; the opinion of scholars; existing jurisprudence holding that the role of a s. 47 *BIA* receiver is similar to that of a trustee in bankruptcy; and having regard to the section as a whole, to related provisions of the *PPSA*, as well as to the purpose of the section, I conclude that PWC's appointment as a s. 47 *BIA* receiver made it "a person who represents the creditors of the debtor"

within s. 20(1)(b). Pursuant to s. 20(2)(b), the time for determination of priorities is thus "the date from which the person's representative status takes effect." PWC's representative status took effect on the date of its appointment under the Appointment Order, namely November 14, 2001. On that date, the Bank had a properly perfected first security interest.

PWC's alternative argument: did the relevant date for determining priorities change when the trustee in bankruptcy was appointed?

75 I must also address PWC's submission that its status as interim receiver under s. 47 of the *BIA* effectively ended when it became trustee in bankruptcy on January 31, 2002 and that the relevant date for the purpose of determining the relative effectiveness of the Bank's security as against PWC is no longer the date on which PWC became the interim receiver, but is now the date on which it became the trustee in bankruptcy. PWC submits that because of the intervening bankruptcy, it is no longer in possession of any of the assets of State in its capacity as receiver and thus it has no interest in the assets that are subject to the Bank's security. Thus, it argues that the Bank's secured interest is no longer effective against it in its capacity as trustee in bankruptcy because that interest became unperfected prior to the assignment into bankruptcy by operation of s. 48(3) of the *PPSA*.[22]

76 There are five considerations that lead me to reject PWC's submission that the date for assessing the effectiveness of the Bank's security interest was the date of the assignment into bankruptcy:

(a) the s. 47 *BIA* receivership did not end when the trustee in bankruptcy was appointed;

(b) the date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift;

(c) the date when the respective security interests of the parties come into conflict is the date of the Appointment Order;

(d) the policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security; and

(e) giving effect to PWC's position would undermine the purpose of s. 20 of the *PPSA* and lead to commercial uncertainty.

77 I now discuss each of these factors in turn.

(a) The s. 47 BIA receivership did not end when the trustee in bankruptcy was appointed

78 PWC submits that the s. 47 *BIA* receivership and the bankruptcy of State are two separate judicial proceedings and that when PWC was appointed trustee in bankruptcy on January 31, 2002, the s. 47 *BIA* receivership ended. According to PWC, the Bank's priority status must therefore be reassessed as of January 31, 2002 when it became trustee in bankruptcy.

79 PWC cites no authority for its proposition and, in my view, its position that the receivership ended upon the bankruptcy is not supported by the jurisprudence or by the terms of the Appointment Order. The effect of bankruptcy on the authority of a court-appointed receiver depends on the circumstances. See *Canadian Imperial Bank of Commerce v. King Truck Engineering Canada Ltd.* (1987), 63 C.B.R. (N.S.) 1 (Ont. C.A.). The court's brief endorsement (per Blair, Robins and Krever JJ.A.) states:

> The appellants submitted that on the occurrence of the bankruptcy the court-appointed receiver was deprived of jurisdiction to deal with the property of the bankrupt. We do not accept this argument and agree with Hughes J. who held that the activities of a receiver-manager appointed by order of the court and a trustee in bankruptcy not so appointed can co-exist in the absence of conflict of interest and of jurisdiction.

80 PWC's submission also ignores the wording of the Appointment Order, which is silent as to when PWC's receivership ends. There is no evidence before us that PWC has passed its final accounts as interim receiver thereby bringing its receivership to an end. More importantly, the Appointment Order specifically contemplates that PWC's receivership will continue after assigning State into bankruptcy. The order appointing PWC as interim receiver gave it broad powers, including the power to make an assignment in bankruptcy and to act as trustee.[23] Under s. 3 of the Order, PWC had the right to "take possession and control of the Property ... and all receipts ... arising out of or from the Property" of the Debtor. It was also given the power in s. 3(f) "to receive and collect *all monies* and accounts *now owed or hereafter owing* to the Debtor in respect of the Property". [Emphasis added.] The property of the debtor would include receivables such as an income tax refund.

81 Further, s. 3(p) of the Appointment Order gives PWC as interim receiver the power to enter into arrangements with any trustee in bankruptcy, including an occupation agreement, and the power to lend money to the trustee, not exceeding $250,000 unless increased by the court. For the interim receiver to be in a position to lend money to the trustee in bankruptcy as contemplated by the Appointment Order, the s. 47 receiver must necessarily continue to exercise possession and control over the assets. I note that almost a year after the trustee was appointed,

on December 19, 2002, the s. 47 BIA receiver transferred the amount of $1,180,243.72 (proceeds from the third asset sale) from its account to the account of the trustee in bankruptcy. The s. 47 BIA receiver then distributed $950,000 to the Bank.

82 Thus, in this case, the role of the s. 47 *BIA* receiver and that of the trustee in bankruptcy were intended to be complimentary.[24] The process envisaged was that the interim receiver would realize all of State's assets and take possession of them, and would continue to act in conjunction with the trustee in bankruptcy. Accordingly, the receivership and the bankruptcy were not two separate and distinct procedures.

(b) The date when a secured party acts to realize on its security is an appropriate date on which to ascertain priorities and the date should not shift

83 PWC submits that the appointment of a s. 47 *BIA* receiver did not "crystallize" the rights of the parties who had a claim against the assets of State.

84 Contrary to PWC's submission, when a secured party acts to realize on its security, that is generally the date on which to apply priority rules. Richard McLaren in *The 2008 Annotated Ontario Personal Property Security Act*, *supra*, at p. 246, states in reference to s. 30:

> A general issue which may arise through the course of the application of the priority rules is the date upon which the priority dispute will be determined. Generally, this will be the date where a secured party acts to realize upon its security.

This passage was also in an earlier version of McLaren's text and was quoted with approval in *Loeb Canada Inc. v. Caisse Populaire Alexandria Ltée* (2004), 7 P.P.S.A.C. (3d) 194 (Ont. S.C.J.).

85 PWC relies on the Model Order referred to above (see para. 25), which expressly permits the filing of registrations under provincial personal property regimes, in support of its position that the appointment of a s. 47 *BIA* receiver is not the date that triggers the application of priority rules. However, at the time the events in the case at bar occurred, the practice in Ontario was to interpret the stay of proceedings in receivership orders to include a stay of any action on the part of a secured creditor to reperfect its security through registration of a financing statement.[25] A secured creditor whose interest had become unperfected could not reregister its interest without leave of the court. Thus, at the relevant time, the practice was to consider the appointment of a s. 47 *BIA* receiver as a triggering event. The effect of PWC's submission is to suggest that the 2004 procedural change to the standard form template receivership order has retrospective substantive implications.

86 The change in practice does not affect the fact that the appointment of a s. 47 *BIA* receiver continues to result in a court-ordered stay of all actions and that this appointment still affects the enforcement rights of unsecured creditors. In that sense, the date of the appointment of the s. 47 *BIA* receiver is a triggering event and the date of the receiver's appointment can still be used to determine priorities.

(c) The date when the respective security interests of the parties came into conflict was the date of the Appointment Order

87 In *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (Ont. C.A.), aff'g (1982), 40 O.R. (2d) 54 (Ont. H.C.), Morden J.A. dealt with a priority conflict between a bank, whose security interest had become unperfected through a lapse in registration, and an inventory supplier, whose security interest was also unperfected. After resolving the priority issue on the basis of which creditor's interest had attached first, Morden J.A. expressed his view on a different basis for coming to the same conclusion. He stated at para. 35:

> ...I think that it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interests came into conflict. This would appear to be March 14, 1980, when the bank sought to enforce its interest against collateral in which Sperry claimed a superior interest. The issue arose at that time — what right did the bank have against Sperry to enforce its security?

The step the bank took on March 14, 1980 to enforce its interest in the collateral was the appointment of a private receiver pursuant to its general security agreement.

88 In this case, the Bank acted to realize upon its security by giving a s. 244 notice and by asking the court to appoint a s. 47 *BIA* receiver pursuant to its general security agreement. The effect of the Bank's act was to have all actions against the debtor stayed by court order. The question of the Bank's right to enforce its security over all of the assets of the debtor arose at that time. The asset sales in November and December merely converted those assets into proceeds which could be distributed according to the priorities over them when the receiver was appointed. I am not aware of any authority that suggests that the date for determining priorities should be the date when funds owing to a debtor are actually received.

(d) The policy of the BIA is not to interfere with the rights of secured creditors in realizing upon their security

89 The policy of the *BIA* is not to interfere with the rights of secured creditors in realizing upon their security. Frank Bennett, in *Bennett on Creditors' and Debtors' Rights and Remedies*,

4th ed. (Toronto: Carswell, 1994) states at p. 703: "The trustee in bankruptcy acquires title to the assets of the bankrupt subject to the rights of secured creditors." Similarly, at p. 416 of *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2006), Lloyd W. Houlden and Geoffrey B. Morawetz state:

> The policy of the *BIA* in the case of bankruptcy is not to interfere with secured creditors except in so far as it may be necessary to protect the estate as to any surplus on the assets covered by the security.
>
> . . . . .
>
> No leave is necessary for a secured creditor to proceed to realize upon its security...

90 The statutory stay of proceedings contained in s. 70(1) of the *BIA* specifically excepts "the rights of a secured creditor", as does s. 71, which vests the property of the bankrupt in the trustee. If the debtor gives notice of his intention to make a proposal, the stay imposed by s. 69(1) does not apply where the secured creditor has given notice of its intention to enforce its security under s. 244(1) more than ten days before the proposal.

91 In light of my earlier comments about the Supreme Court's decision in *Giffen, Re*, it is also important to observe that *Giffen, Re* does not justify using the date of the bankruptcy, rather than the date of the receivership, as the necessary reference date for determining priorities for the significant reason that the wording of the Ontario legislation is different from that considered by the Supreme Court in *Giffen, Re*. The B.C. provision the Supreme Court was asked to interpret read: "A security interest ... in collateral is not effective against ... a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy." The B.C. legislation, unlike Ontario's *PPSA*, does not refer to "a person who represents the creditors of the debtor." Section 20(2)(b) of the Ontario *PPSA* further specifies that the rights of the creditor's representative are to be "determined as of the date from which the person's representative status takes effect" while the B.C. legislation forces an inquiry as to whether the security interest was perfected at the date of the bankruptcy. This different legislative language means that the decision in *Giffen, Re* cannot be applied to set the date of the bankruptcy, rather than the date of the receivership, as the starting point.[26]

92 The importance of the wording of the applicable provincial legislation in determining parties' rights in a bankruptcy is highlighted by the decision of *Lefebvre, Re*, [2004] 3 S.C.R. 326 (S.C.C.). In *Lefebvre* [*Lefebvre, Re*, 2001 CarswellQue 2642 (C.S. Que.)], the bankruptcy judge and the majority of the Quebec Court of Appeal [2003 CarswellQue 446 (C.A. Que.)] had applied *Giffen, Re* to two priority disputes, the facts of which were indistinguishable from those considered in *Giffen, Re*. Writing for the court, Lebel J. allowed the appeal and held at para. 40 that the Quebec courts had given *Giffen, Re*:

> ...a significance it did not in fact have, as the court failed to take into account the statutory context established by the provincial legislation of British Columbia, which defined the respective rights of a long-term lessor of a motor vehicle and the trustee in bankruptcy of the lessee. ... [T]he provincial legislation itself defined the nature of the respective rights of lessors and trustees. ... As has already been mentioned, the *Civil Code of Quebec* does not provide for a similar consequence for failure to publish the rights out of a lease. In this context, *Giffen* did not justify the solution adopted by the Court of Appeal.

93 *Lefebvre* thus makes it clear that *Giffen, Re* cannot be applied generally without regard to the statutory context.

94 To interpret s. 20(2)(b) in a manner that shifts the reference point for the determination of priorities from the date the Bank acted to realize on its security by appointing a s. 47 *BIA* receiver to the date the trustee in bankruptcy was appointed interferes with the enforcement process and is not consonant with bankruptcy policy.

(e) Giving effect to PWC's position would undermine the purpose of s. 20 of the PPSA and lead to commercial uncertainty

95 Finally, to read the reference point for determining priorities between the representative of the creditors and the secured creditor as changing in the way that PWC suggests undermines the purpose of s. 20 which, as I have indicated, is to preserve the priorities as they stood at the time "a person who represents the creditors of the debtor" was appointed. From a practical point of view, changing the date for determining priorities would lead to commercial uncertainty. As noted by Winkler J. in *Sun Life Assurance Co. of Canada v. Royal Bank* (1995), 10 P.P.S.A.C. (2d) 246 (Ont. Gen. Div. [Commercial List])), the purpose of the *PPSA* registration regime is to impart order and certainty to commerce. To reverse priorities in the middle of the distribution process when there has been no change in the receiver's control over the assets is completely contrary to the goals of the legislation.

Conclusion

96 Although the Bank was not exempt from the obligation to file a financing change statement or a fresh financing statement upon learning of State's name change, its failure to do so in this case did not result in a loss of priority. In my opinion, the date for determining the effectiveness of the Bank's security interest is November 14, 2001, when the court appointed PWC as interim receiver. This date for determining priorities did not change with the appointment of PWC as trustee in bankruptcy.

Disposition

97 For the reasons I have given, I would allow the appeal, set aside the order of the motion judge, and in its place provide the following direction to PWC:

> That the security granted by State to the Bank as Agent is fully effective as against PWC with respect to the Estate Funds (as defined in PWC's notice of motion and attached report) and that PWC act in the administration of the Estate accordingly.

98 With respect to costs, I note that no award of costs was made to the Bank or to St Paul at first instance as this was a novel issue and the costs of PWC were ordered to be paid out of the estate. I would make the same order here.

K. Feldman J.A.:

1 When the appellant bank sought the appointment of an interim receiver of the debtor company, it held a perfected security interest over the assets of that company. However, during the receivership the appellant allowed its registration under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "*PPSA*") to lapse. The appellant did not re-perfect its security interest before the interim receiver assigned the debtor into bankruptcy, following which, a significant tax refund came into the debtor's estate.

2 The appellant asserts priority under ss. 20(1)(b) and 20(2)(b) of the *PPSA* over the tax refund and some other undistributed funds, on the basis that the date when the receiver was appointed is the date for determining priority, and on that date, the appellant's security interest was perfected. In contrast, the trustee in bankruptcy says that the relevant date for determining priority is the date of the assignment into bankruptcy. Because on that date the appellant's security interest was unperfected as against the trustee, the appellant ranks as an unsecured creditor, *pari passu* with other unsecured creditors.

3 The motion judge dismissed the appellant's claim. For the reasons that follow, I agree with the motion judge and would dismiss the appeal.

Background

4 The appellant held a first registered general security interest over the personal property of State, the debtor, and sought to enforce its security by seeking the appointment of an interim receiver under s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A court order appointing the respondent, PricewaterhouseCoopers Inc. ("PWC"), as interim

receiver was issued on November 14, 2001. Following its appointment, the interim receiver sold the substantial assets of State in three sales. In accordance with the vesting orders of the court, the interim receiver distributed the proceeds of the first two sales to the creditors according to their respective priorities at the time of the sales. As part of the first sale on November 14, 2001, the receiver sold State's name triggering s. 48(3) of the *PPSA*, which provides:

> Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

5 On January 31, 2002, in accordance with the terms of the order appointing it as interim receiver, PWC assigned the debtor into bankruptcy and PWC was appointed the trustee in bankruptcy of the debtor's estate. Following the assignment, the trustee in bankruptcy received an income tax refund of $4.325 million from the Canada Revenue Agency.

6 Before the date of the debtor's assignment into bankruptcy (and before the third sale of assets) both the appellant bank and St. Paul Guarantee Insurance Company ("St. Paul"), a subsequent secured creditor, had knowledge of the sale of the debtor's name and failed to register a financing change statement. Therefore, both of their secured debts had become unperfected in accordance with s. 48(3).[27]

7 Following the debtor's assignment into bankruptcy, the appellant bank asserted a first priority right to the income tax refund and some other funds held by the trustee by filing a proof of claim, which included a secured claim in the amount of $20 million, with PWC as trustee in bankruptcy. In response, the trustee in bankruptcy brought a motion for the advice and direction of the court as to whether the appellant bank's security interest, which was unperfected at the date of the bankruptcy, remained effective against it as trustee.

8 The motion judge reached the following conclusions:

> 1. An interim receiver appointed under s. 47(1) of the *BIA* is not a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*.
>
> 2. The order appointing the interim receiver, which contemplated that interested parties could move for a lift of the stay it imposed, did therefore not have the effect of precluding the appellant from maintaining the perfected status of its security interest

following the appointment of the interim receiver.

3. A court has no jurisdiction to override provisions of the *PPSA*, including s. 48(3), and the appellant's security interest became unperfected in accordance with that section.

4. As an alternative to its argument that the interim receiver is a person who represents the creditors of the debtor, the appellant argued before the motion judge that it held a perfected security interest in the income tax refund and other amounts on the basis that the interim receiver took possession of those funds "on behalf of" the appellant upon its appointment at the behest of the appellant. The motion judge rejected that argument and held that s. 26(2) of the *PPSA* has no application to the facts of this case, as the interim receiver did not take possession of the income tax refund on behalf of the appellant bank.[28]

5. PWC only became a person who represents the creditors of the debtor within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* upon its appointment as trustee in bankruptcy. Because at that time the security interest of the appellant was unperfected, it was and remains ineffective against the trustee from that date.

Issues

9 My colleague has identified two issues for determination on this appeal:

1. Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the *PPSA*?

2. Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?

The resolution of the second issue requires a determination of whether an interim receiver appointed under s. 47(1) of the *BIA*, although not referred to by name in ss. 20(1)(b) and 20(2)(b), is "a person who represents the creditors of the debtor" within the meaning of these provisions. It also requires a determination of the purpose and effect of ss. 20(1)(b) and 20(2)(b).

10 During the applicable period, ss. 20(1) and 20(2) of the *PPSA* read as follows:

20(1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or

(ii) a person who causes the collateral to be seized through execution, attachment, garnishment, charging order, equitable execution or other legal process, or

(iii) all persons entitled by the *Creditors' Relief Act* or otherwise to participate in the distribution of the property over which a person described in subclause (ii) has assumed control, or the proceeds of such property;

(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy

(c) in chattel paper, documents of title, securities, instruments or goods is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;

(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transfer that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

20(2) The rights of a person,

(a) who has a statutory lien referred to in subclause (1) (a) (i) arise,

(i) in the case of the bankruptcy of the debtor, at the effective date of the bankruptcy, or

(ii) in any other case, when the lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien;

(b) *under clause (1) (b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect* (b).

[Emphasis added.]

11 In his submissions, counsel for the appellant characterized the effect of ss. 20(1)(b) and 20(2)(b) to be that when a representative of creditors is appointed, "the music stops" under the *PPSA*, meaning that the priority rights of all parties are frozen for the purpose of distribution of the estate of the debtor.

12 The appellant's position is that an interim receiver, appointed by the court under s. 47(1) of the *BIA*, is "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b) of the *PPSA*. The appellant submits that upon the appointment of the interim receiver, the priority interests of all creditors of the debtor are frozen and the interim receiver is to distribute the assets or proceeds of the assets of the debtor, no matter when they are realized or distributed, in accordance with the respective priority positions of the creditors as of the date of the receiver's appointment.

13 To the extent that the security interest of a secured creditor may become unperfected under s. 48(3) of the *PPSA* following the appointment of a representative of creditors, submits the appellant, this post-appointment event has no bearing on the secured creditor's priority for the purpose of the distribution of assets of the debtor's estate. Or, put another way, the effect of the order appointing the interim receiver was to exempt the appellant from the requirement of complying with s. 48(3). Consequently, the fact that the appellant failed to file a financing change statement before the date of the debtor's assignment into bankruptcy and the appointment of the trustee in bankruptcy did not affect the appellant's entitlement to continue to be paid from the assets of the estate in accordance with its priority position as it stood on the date of the appointment of the interim receiver, at which time its security interest was perfected.

14 I summarize my reasons for rejecting the appellant's position as follows. First, although an interim receiver may represent the creditors of the debtor for some purposes, it is not "a person who represents the creditors of the debtor" within the meaning and purpose of ss. 20(1)(b) and 20(2)(b), and the term "receiver" should not be read in to these subsections. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the collateral and obtains no priority rights under ss. 20(1)(b) or 20(2)(b) in the collateral, or in respect of the collateral, and thus is not in a priority contest with any creditor on behalf of unsecured creditors. The purpose of these subsections is to allow the representative of creditors to defeat unperfected security interests on behalf of unsecured creditors whose rights to collect outstanding debts from the debtor are statutorily stayed, such as on bankruptcy or assignment for the benefit of creditors. Unlike on a bankruptcy or assignment for the benefit of creditors, creditors' priority rights are not statutorily stayed on a receivership. Although such rights may

be stayed by the order appointing the receiver, a creditor may apply to lift the stay in order to commence or continue proceedings to collect its debt.

15 Second, the effect of ss. 20(1)(b) and 20(2)(b) is to determine the priority rights of creditors at a particular time, but not to freeze priorities for all time, or, in the words of appellant's counsel, to "stop the music". Neither these subsections nor the order appointing the interim receiver had the effect of exempting the appellant from the requirement of complying with s. 48(3). Consequently the appellant's security interest became unperfected by its failure to file a financing change statement within the time period specified by s. 48(3). Because it also failed to re-register under s. 30(6) before the debtor's assignment into bankruptcy, the appellant's security interest is not effective against the trustee in bankruptcy.

Analysis

Issue 1: Did the order appointing the interim receiver give the appellant an exemption from complying with s. 48(3) of the PPSA?

16 The motion judge found that the order appointing the receiver did not exempt the appellant from complying with s. 48(3), nor did the stay provisions of the order prevent the appellant from seeking to lift the stay in order to file a financing change statement. My colleague concludes that the motion judge was correct on this issue and I agree. In my view, the consequence of this conclusion is that the appellant's failure to comply with s. 48(3) caused its security interest to become unperfected and to be ineffective against the trustee in bankruptcy under ss. 20(1)(b) and 20(2)(b).

Issue 2: Did the appellant's failure to file a financing change statement result in a loss of its priority as a secured creditor?

(i) Subsection 20(1) of the PPSA

17 Subsection 20(1) prescribes the effect of perfection of a security interest in collateral in relation to other claims against the same collateral and defines the rules for determining priority between the holder of an unperfected security interest and others with a claim to, or an interest in, the collateral. Under s. 20(1)(a), an unperfected security interest "is subordinate to" perfected security interests in the same collateral as well to the interests of lienholders and of unsecured creditors who have seized the collateral through legal processes.

18 In contrast, under ss. 20(1)(b), (c) and (d), an unperfected security interest "is not effective" against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy, and against certain transferees of the

debtor's property. The different language is used because s. 20(1)(a) orders the priority among secured creditors and other creditors with a realized interest in the collateral, while under ss. 20(1)(b), (c) and (d), an unperfected security interest is treated as an unsecured interest as against the named persons.

19 In order to interpret the meaning and scope of the term "a person who represents the creditors of the debtor" in s. 20(1)(b) of the *PPSA*, one must examine the language of ss. 20(1)(b) and 20(2)(b), since both clauses work together, as well as the purpose of the provisions, which I will discuss later in these reasons.

20 Clause 20(1)(b) states that a security interest in collateral, until perfected, "is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy." Before this provision was amended in 1989, it provided that an unperfected security interest in collateral was ineffective against three named representatives: a trustee in bankruptcy, an assignee for the benefit of creditors and a receiver. See *Personal Property Security Act*, R.S.O. 1980, c. 375, s. 22(1)(a)(iii). While in amending the provision the legislature specifically removed the reference to a "receiver", it also added the term "including", which now precedes "assignee for the benefit of creditors" and "trustee in bankruptcy". The appellant argues that because the legislature used the word "including", the removal of the reference to a "receiver" does not indicate an intention by the legislature to exclude receivers from the ambit of the provision.[29]

21 I disagree. The legislature's removal of a receiver from s. 20(1)(b) means the appellant cannot succeed without showing that an interim receiver is a "person who represents the creditors of the debtor" in the sense that fits the language and purpose of both ss. 20(1)(b) and 20(2)(b). There is no question that, in carrying out its functions and duties, an interim receiver can act in a representative capacity on behalf of some or all of the creditors.[30] The issue in this case is whether an interim receiver is the type of representative of creditors that is referred to in these two clauses.

(ii) A receiver does not obtain the debtor's proprietary interest in the collateral

22 The first relevant difference between a receiver and a trustee in bankruptcy or an assignee for the benefit of creditors is that a receiver does not obtain the debtor's proprietary interest in the collateral. In their text *Personal Property Security Law* (Toronto: Irwin Law Inc., 2005), Professors Cuming, Walsh and Wood, at pp. 441-42, begin their discussion of the interface between s. 20 of the *PPSA* and the *BIA* by explaining that the vesting of the debtor's personal property in the trustee in bankruptcy under s. 71(2) of the *BIA* gives the trustee the independent status to defeat unperfected security interests in that property under s. 20:

The *PPSA* provides that a security interest is not effective against a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy. The effect of this is to give to the debtor's trustee in bankruptcy an independent status to defeat unperfected security interests in personal property that vests in the trustee as provided by *BIA* [sub]section 71(2). [Citations omitted.]

23 The two creditors' representatives named in s. 20(1)(b) share an important characteristic: by virtue of statute (s. 71 of the *BIA* and ss. 7 and 8 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33), upon their respective appointments, the proprietary rights of the debtor in the collateral vest in these representatives.

24 Section 71 of the *BIA* provides:

71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

25 Sections 7 and 8 of the *Assignments and Preferences Act* provide:

7. Every assignment made under this Act for the general benefit of creditors, if the property is described in the words "all my personal property that may be seized and sold under execution and all my real estate, credits and effects", or in words to the like effect, vests in the assignee all the real and personal estate, rights, property, credits and effects, whether vested or contingent, belonging to the assignor at the time of the assignment, except such as are by law exempt from seizure or sale under execution, subject, however, as regards land, to the *Registry Act* and the *Land Titles Act*.

8. Every assignment for the general benefit of creditors, whether it is or is not expressed to be made under or in pursuance of this Act and whether the assignment does or does not include all the real and personal estate of the assignor, vests the estate, whether real or personal or partly real and partly personal, thereby assigned in the assignee therein named for the general benefit of creditors, and the assignment and the property thereby assigned is subject to all the provisions of this Act, and the same applies to the assignee named in the assignment.

26 As a result, these representatives hold the debtor's proprietary interest in the collateral. This is to be contrasted with the role and legal status of a receiver, whether privately or court-appointed. I will discuss court-appointed receivers because in this case, PWC is a court-appointed receiver and a court-appointed receiver has statutory authority.

27 One important difference between a court-appointed receiver and a trustee in bankruptcy (or assignee for the benefit of creditors) is that a receiver obtains its powers from an order of the court. These powers allow the receiver to administer the business and assets of the debtor, and to effect a sale of the debtor's assets pursuant to a vesting order of the court. However, the debtor's property rights in the assets, whether the debtor has full or partial title or merely a right of possession, do not devolve onto the receiver as they do onto a trustee in bankruptcy by statute under s. 71 of the *BIA*. As the motion judge stated at para. 29:

> The appointment of an Interim Receiver does not vest the assets of the debtor in the Interim Receiver, as in the case of a Trustee in Bankruptcy, nor do the liabilities of the debtor become liabilities of the Interim Receiver whereas, in the case of a bankruptcy, the liabilities become liabilities of the bankrupt estate to be administered and, subject to the rights of secured creditors, paid or compromised by the Trustee out of the assets of the bankrupt estate.

28 The receiver is solely an administrator accountable to the court and to all stakeholders in the receivership, appointed to ensure that the debtor's assets are realized in an orderly manner and for the maximum realizable value, and then to distribute the proceeds to creditors and other claimants in accordance with their respective priorities. It is in that way that a receiver may represent creditors. As the motion judge pointed out, a debtor could retain possession and remain in business during a receivership, and, subject to the terms of the order appointing the interim receiver, could borrow additional funds and create additional security that would continue after the termination of the receivership. In some circumstances the debtor could retain the business following the discharge of the receiver. The debtor is not stripped of all of its interest in the collateral upon the appointment of an interim receiver.

29 The fact that ss. 20(1)(b) and 20(2)(b) deal with proprietary rights is reflected in the language and effect of s. 20(2)(b) which states:

> 20(2) The rights of a person,
>
> . . . . .
>
> (b) under clause (1)(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

The effect of s. 20(2) is to define the time from which the rights of statutory lienholders under s. 20(1)(a)(i) and of representatives of creditors under s. 20(1)(b) are to be determined. The effective timing of the other rights under ss. 20(1) (a), (c) and (d) is built into the description of those rights. (See para. 10 above for the relevant provisions.)

30 However, the wording of s. 20(2)(b) also tells us that s. 20(1)(b) has conferred "rights ... in respect of the collateral" on the representative of creditors and that those rights are to be determined "as of" the effective date of the representative's appointment. Although the term "rights", standing alone, is used in s. 60 of the *PPSA* to mean the right to take administrative steps, "rights ... in respect of the collateral" are rights that indicate a proprietary or priority interest in the collateral that entitles the holder of such rights to be paid out of the proceeds of that collateral in accordance with its priority.

(iii) A receiver does not assert the claim of the unsecured creditors against competing security interests

31 A trustee in bankruptcy, unlike a receiver, represents the creditors in another way beyond administering the estate: the trustee holds the debtor's proprietary interest in the assets on behalf of the unsecured creditors. As Iacobucci J. stated in *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.) at para. 41 (referring to the Saskatchewan Court of Appeal decision in *Paccar Financial Services Ltd. v. Sinco Trucking Ltd. (Trustee of)*, [1989] 3 W.W.R. 481 (Sask. C.A.), at 490):

> [T]he trustee, after bankruptcy, acts as the representative of the unsecured creditors of the bankrupt and asserts "the claim of the unsecured creditors to the goods and possessions of the bankrupt pursuant to the priorities established for competing perfected and unperfected security interests."

32 Consequently, a trustee occupies a priority position for the purpose of distribution of the proceeds of the debtor's estate. In that sense, a trustee in bankruptcy is in competition with other creditors for its priority position among creditors, and its rights in the collateral are in competition with the rights of other creditors in the collateral. In contrast, a receiver is not in competition with creditors and has no priority position itself because any rights it has in the collateral are administrative but not proprietary. It is merely an administrator who pays out the proceeds to the creditors, both secured and unsecured, if there are sufficient funds, in the order of their priority.

33 In *Giffen, Re*, Iacobucci J. discussed the purpose and effect of s. 20 of the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359-which is the counterpart of s. 20 of the *PPSA* but with slightly different wording. He explained that the reason why the *PPSA*

provides that a trustee in bankruptcy defeats an unperfected security interest is because, before bankruptcy, an unsecured creditor can take steps to obtain and enforce a judgment against the debtor through execution proceedings that will rank ahead of an unperfected security interest under s. 20(1)(a)(i). However, once bankruptcy occurs, "all claims are frozen and the unsecured creditors must look to the trustee in bankruptcy to assert their claims." *Giffen, Re*, *supra* at para. 39. As Anthony Duggan and Jacob Ziegel explain when discussing *Giffen, Re* in their article, "Justice Iacobucci and the Canadian Law of Deemed Trusts and Chattel Security" (2007), 57 U.T.L.J. 227 at 231: "If the debtor becomes bankrupt while the execution process is still in train, the execution creditor loses this priority by virtue of the stay provisions in the *BIA*, ss. 69.3 and 70."

34 In *Giffen, Re*, *supra* at para. 39, Iacobucci J. adopted the following statement by Professor Cuming in his article entitled "Canadian Bankruptcy Law: A Secured Creditor's Heaven" (1994), 24 Can. Bus. L.J. 17 at 27-28:

> In effect, the judgment enforcement rights of unsecured creditors are merged in the bankruptcy proceedings and the trustee is now the representative of creditors who can no longer bring their claims to a "perfected" status under provincial law. As the repository of enforcement rights, the trustee has status under s. 20(b)(i) of the B.C. *PPSA* to attack the unperfected security interest.

And at para. 41, Iacobucci J. agreed with the conclusion of the Saskatchewan Court of Appeal at p.490 of *Paccar* that: "It is simply a contest as between an unsecured creditor and the holder of an unperfected security interest."

35 In their discussion of *Giffen, Re*, Professors Duggan and Ziegel, *supra* at 231-34, explain how bankruptcy law works with the *PPSA* to preserve creditors' relative priority entitlements post-bankruptcy. The authors comment that Iacobucci J.'s decision in *Giffen, Re* confirms "the complementary relationship between the federal bankruptcy statute and the provincial PPSAs": *supra* at 249.

36 It follows from *Giffen, Re* that a receiver is not intended to be included as a "person who represents the creditors of the debtor" for the purpose and therefore within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA*. The reasons for this conclusion are: (a) unlike in a bankruptcy, a receiver, including a court-appointed interim receiver, does not stand in for unsecured creditors in a priority contest with any other creditor; (b) a receiver is not the "repository of enforcement rights" of unsecured creditors with any status to "attack the unperfected security interest" (*Giffen, Re*, *supra*, at para. 39); and (c) in a receivership, unlike in a bankruptcy, there is no statutory stay causing execution creditors to lose their priority and ability to realize on their debt.

(iv) Personal Property Security Acts of other provinces

37 The conclusion that a receiver is not a person who represents the creditors of the debtor under s. 20 is also consistent with the correlative sections of the Personal Property Security Acts of the other common law provinces.[31] The comparable provisions in British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland do not include a receiver.[32] Only the relevant sections of the Manitoba and Ontario Acts formerly referred to a receiver, but both have since been amended to remove this reference.

38 The Manitoba statute contained a provision with language identical to the previous version of the Ontario section, R.S.O. 1980, c. 375, which read:

> 22(1) [A]n unperfected security interest is subordinate to
>
> (a) the interest of a person
>
> . . . . .
>
> (iii) who represents the creditors of the debtor as assignee for the benefit of creditors, trustee in bankruptcy or receiver...
>
> 22(2) The rights of a person under sub-clause 1(a)(iii) in respect of the collateral are referable to the date from which his status has effect and arise without regard to the personal knowledge of the representative if any represented creditor was, on the relevant date, without knowledge of the unperfected security interest.

Manitoba's replacement provision does not use the term "includes", but instead lists only two representatives of creditors, neither of which is a receiver.[33]

39 The Manitoba courts considered the effect of the former wording of s. 22 in the context of a court-appointed receivership in the case of *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1991] 6 W.W.R. 764 (Man. Q.B.), aff'd (1992), 94 D.L.R. (4th) 611 (Man. C.A.). The court had appointed a receiver of the debtor trucking company at the request of a secured creditor, Roynat. Another secured creditor, Paccar, had a prior purchase-money security interest in some of the trucks, but had inadvertently failed to renew its *PPSA* registration and was unperfected on the date of the appointment of the receiver. Paccar sought an extension of time to re-perfect its security under s. 65 of the Manitoba *PPSA*, which provided that when an extension is granted "the rights of other persons accrued up to the time of the registration of the order made under this section are not affected by the order." The receiver opposed Paccar's motion. It took the position that on its appointment as a receiver, by operation of ss. 22(1)(a)(iii) and 22(2), it had accrued the rights referred to in s. 65.

40 In the Court of Queen's Bench, Scollin J. rejected the position of the receiver. He explained that even though a receiver was referred to in s. 22, the rights and interests of a receiver are not the same as those of a trustee in bankruptcy. He concluded at 768 that:

> [T]he provisions of s. 22 can be sensibly reconciled with the provisions of s. 65 by recognizing that the only rights of the creditor which should be subordinated to the interest and rights of the receiver are those which necessarily conflict with the due exercise of the rights of the receiver as representative of the creditors in executing the mandate of the court. The status of a receiver does not bring with it a cornucopia of rights.... Beyond his mandate, the receiver has no status. Unless his rights or interests are affected, no issue of subordination even arises. In this case he has demonstrated no diminution of his rights or interest and no prejudice to any creditor. To recognize the substantive security interest of Paccar causes no injustice or prejudice to the receiver or to other creditors and permits full recognition of and harmony between ss. 22 and 65 of the Act. Absent prejudice, the receiver's rights or interest do not extend to defeating an application which, but for his appointment, would be effective to relieve against an inadvertent lapse.

41 The Court of Appeal dismissed the appeal. Twaddle J.A. acknowledged that Scollin J. may have been correct in his view, distinguishing a trustee in bankruptcy from a receiver, that while a trustee in bankruptcy does acquire a priority property right on appointment, a receiver does not. However, he said he was not required to decide the issue because he could dismiss the appeal based on his interpretation that s. 22 did not defeat the remedial effect of s. 65. He stated at p. 615:

> An order made under s. 65 re-perfects the security interest as though it had never lapsed, subject only to the rights of those who have dealt with the debtor in the meantime and who would be prejudiced by permitting the order under s. 65 to have retroactive effect.

42 In my view, Scollin J.'s analysis of the rights of a receiver was correct and consistent with the conclusion reached on the appeal. Furthermore, his understanding was given full effect when s. 22 was repealed and replaced in Manitoba in 1993 with the new provision that excludes a receiver from its ambit. As mentioned above, the equivalent statutory provisions of the other common law provinces do not make reference to a receiver.

(v) The effect of a court-ordered stay

43 Other case law has also considered the issue of re-perfecting a security interest following

the appointment of a receiver or of a monitor under s. 11.7 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. This case law arises because when a receiver (or monitor) is appointed, unlike in a bankruptcy, the debtor does not lose all rights and interest in the collateral and the rights of creditors are not statutorily frozen. Although an order appointing a receiver will normally stay all proceedings against the interests of the debtor, the court can always lift the stay to allow a creditor to take certain steps to enforce its rights or perfect its security against the debtor, subject to considering competing rights acquired by other creditors in the interim.

44 Subsection 30(6) of the Ontario *PPSA* provides:

> Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

Using s. 30(6), a secured creditor with a security interest that is originally perfected by registration but becomes unperfected, can re-perfect by registration and regain its priority standing as against all other creditors except as against someone who "acquired rights in all or part of the collateral" while the creditor's security interest was unperfected.

45 As was decided in *Roynat*, supra, on appointment, a receiver does not acquire any rights in the collateral that are in competition with the rights of any creditor. In other words, a receiver does not obtain the right to receive any portion of the proceeds of the estate of the debtor. Consequently, a secured creditor whose security interest had been perfected at some point but was unperfected on the date of the appointment of a receiver may re-perfect under s. 30(6) and retain its priority, regardless of the appointment of a receiver in the interim, by obtaining a lift-stay order from the court, if necessary.

46 For example, in *TRG Services Inc., Re* (2006), 26 C.B.R. (5th) 203 (Ont. S.C.J.) at paras. 53-59, C. Campbell J. held that a monitor under the *CCAA* is not a representative of creditors within s. 20(1)(b) of the *PPSA*. He stated that "[t]he fact that the Initial Order envisaged the Monitor assessing claims as between creditors does not grant it any legal entitlement to or over the assets of the debtor": *TRG Services Inc., Re, supra* at para. 57. C. Campbell J. allowed the appeal from the decision of the monitor who had refused to allow a secured creditor to perfect its security after the *CCAA* order. He concluded that there was nothing in the *CCAA* that would permit the exercise of any jurisdiction to disallow registration and that s. 20(1)(b) did not apply for the reasons quoted.

47 Similarly, in *Brookside Capital Partners Inc. v. Kodiak Energy Services Ltd. (Receiver-Manager of)* (2006), 25 C.B.R. (5th) 273 (Alta. Q.B.), Richter was first a monitor of the debtor, Kodiak, under the *CCAA* and subsequently, receiver-manager of Kodiak appointed by the court to carry out a sale of its assets. Brookside was a secured creditor of Kodiak whose registration under the Alberta *PPSA* was defective. Consequently, both before and on the date of the appointment of the receiver, Brookside's security interest was unperfected.

48 Brookside registered a financing change statement on the day the receiver was appointed and sought leave of the court to lift the court-ordered stay and validate that registration *nunc pro tunc*. Richter, as Kodiak's receiver, took the position that Brookside's security interest was ineffective against it. As in this case, the receiver argued that its role was similar to a trustee in bankruptcy and it should therefore have the same tools as those provided to trustees in bankruptcy by the *PPSA*

49 The first issue before the *Brookside* court was "whether a receiver should be seen as entitled to the same priority as is granted to a trustee in bankruptcy by s. 20(a)(i) of the *PPSA*": *supra* at para. 13. The second question was whether the stays under both appointment orders should be lifted to allow Brookside to validate its registration *nunc pro tunc*. The application judge made the important observation that the second issue would not arise if a receiver is the same as a trustee under s. 20(a)(i) because, in that event, Brookside's unperfected security interest would be ineffective against the receiver and "Brookside's attempted correction of its registration after the date of the Receivership Order *could not improve its position*": *supra* at para. 14. [Emphasis added.]

50 The application judge concluded on the first question that because s. 20(a)(i) of the Alberta *PPSA* refers only to a trustee in bankruptcy, it cannot be interpreted to also refer to a receiver.[34] He then went on to decide the second question. He concluded that there would be no prejudice to the debtor or any of the other creditors by allowing Brookside to perfect its security as of the date of the receivership, because had the *CCAA* and receivership orders not been made, Brookside could have perfected at any time. Since s. 20(a)(i) did not apply, there was no reason why the secured creditor could not register under the *PPSA*. Nor was there any purpose in precluding the *ex post facto* registration.

51 As these cases demonstrate, in a receivership, because a creditor's right to take steps against the debtor is stayed not by any legislative directive, but rather by virtue of the terms of the order appointing the receiver, such a stay can be lifted by the court to allow a secured or unsecured creditor to pursue its rights against the interests of the debtor in appropriate circumstances, including obtaining judgment or asserting a lien, and to effect relevant registrations. This includes registrations under s. 30(6) of the *PPSA* to regain priority for the purpose of distribution of the debtor's assets by the receiver.

52 In fact, the new Standard Template Receivership Order of the Commercial List — which

is to be used when a receiver is appointed by the Superior Court of Justice — clearly excepts registrations under the *PPSA* from the effect of the stay. Paragraph 9, which contains the stay order, specifically provides that nothing in that paragraph prevents "the filing of any registrations to preserve or perfect a security interest". This paragraph clearly describes the understanding of the bench and bar that the "music" does not stop on the appointment of a receiver because the ongoing need to register and to perfect security is recognized and acknowledged. There would be no cause or purpose in doing so if priorities were frozen on the date of the order.

53 There is nothing in the *PPSA* that says that it stops being applicable at any time. In particular, s. 20 does not prevent ss. 48(3) or 30(6) from continuing to apply and to have effect. It does not freeze priority positions but just states the consequences of non-perfection at a point in time. There is no legislated freezing of priorities, or anything that "stops the music" in a receivership, other than the court order creating it which provides for the ability to seek and obtain a lift-stay order. Consequently, the result the appellant seeks to achieve — the freezing of priority positions — does not occur in a receivership. Nor are the unsecured creditors left in a position where they are necessarily precluded from taking further steps to enforce their rights against the interest of the debtor. Therefore, when a receiver is appointed, the unsecured creditors do not need s. 20(1)(b) to level the playing field for them as against unperfected security interests. A receiver is not a "repository of enforcement rights" like a trustee in bankruptcy; nor do unsecured creditors need to rely on a receiver to attack unperfected security interests

54 In a bankruptcy, not only does the debtor have no further interest in the collateral, but also the priority rights of creditors are "frozen", as stated by Iacobucci J. in *Giffen, Re, supra* at para. 39 by virtue of s. 71 and s. 69.3(1) of the *BIA*,[35] the latter of which provides:

> Subject to subsections (2) and (3) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or may commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

55 Consequently, in a bankruptcy, the effect of ss. 20(1)(b) and 20(2)(b) together with the *BIA* is that a security interest in collateral that is unperfected on the date of bankruptcy is ineffective against the trustee throughout the bankruptcy, and that unperfected status cannot be cured in relation to the trustee. Similarly, a security interest that is perfected on the date of bankruptcy is effective against the trustee and remains effective because the bankrupt estate is frozen and the debtor no longer has any interest in the collateral for the purposes of registration.

(vi) Trustee's alternative argument

56 The trustee in bankruptcy argued on this appeal that even if the receiver is "a person who represents the creditors of the debtor" under s. 20(1)(b), because the appellant bank's security interest was unperfected on the date when the trustee in bankruptcy was appointed, its security interest was ineffective against the trustee under the express words of s. 20(1)(b). The appellant's position was that once priorities were frozen on the appointment of the interim receiver, they remained frozen on the appointment of the trustee. My colleague has concluded that the interim receivership never terminated, that the tax refund came to the interim receiver, and that the sections operate from and relate back to the original date when PWC was first appointed as interim receiver, at which time the appellant's security interest was perfected.

57 In respect of the trustee's position, I agree that the appellant's security interest is ineffective against the trustee. As I have explained, ss. 20(1)(b) and 20(2)(b) should not be read to apply to a receiver for two reasons. Unlike a trustee in bankruptcy and an assignee for the benefit of creditors, a receiver does not obtain the debtor's rights in respect of the collateral and is therefore not in a priority contest with any creditor on behalf of unsecured creditors. Also, in a receivership, the debtor maintains its rights in the collateral. Second, unlike in a bankruptcy, creditors' rights are not frozen on a receivership by statute. Those rights may be stayed by the court order appointing the receiver, but as in the order in this case, the stay can be and often is lifted in order to allow a creditor to register to maintain its perfected status — for example, under s. 48(3) — or to re-perfect under s. 30(6). As already noted, the new standard form of order for a court-appointed receiver no longer includes any stay of a creditor's right to perfect or re-perfect its security interest. The only purpose for a creditor to perfect or re-perfect after a receiver is appointed is to maintain its priority during the receivership.

58 The motion judge found, in accordance with the record and the position of the trustee, that the tax refund came into the hands of PWC as trustee in bankruptcy. The interim receiver assigned the debtor into bankruptcy in accordance with the order appointing it, at which time the provisions of the *BIA* applied, including s. 71. It was not disputed, either before the motion judge (see para. 59 of his reasons) or on this appeal, that the property of the debtor passed to the trustee on the date of the bankruptcy. Section 20(1)(b) of the *PPSA* says that an unperfected security interest is ineffective against a trustee in bankruptcy. The court is required to give effect to that specific statutory provision.

Conclusion

59 I agree with the motion judge that a receiver is not a representative of creditors within the meaning of ss. 20(1)(b) and 20(2)(b) of the *PPSA* and the term "receiver" should not be read in to the legislation. Because the appellant's security interest became unperfected as a result of the operation of s. 48(3), and because it did not re-perfect its security interest before the assignment

of the debtor into bankruptcy, it was unperfected on the date of the appointment of the trustee and its security interest is therefore ineffective against the trustee.

60 The unfortunate result for the appellant, and apparent windfall for St. Paul, is that the appellant loses its priority over St. Paul, and even though St. Paul also lost its secured standing, they rank *pari passu* as unsecured creditors in the bankruptcy. This result flows from the fact that both were unperfected on the date of the appointment of the trustee and both their security interests are therefore ineffective against the trustee.

61 I would dismiss the appeal with costs to the trustee and to St. Paul out of the estate. I would fix those costs in the amount of $15,000 each, inclusive of disbursements and G.S.T.

H.S. LaForme J.A.:
I agree.

Appeal dismissed.

Footnotes

1 Section 1(1) of the *PPSA* defines "collateral" as "personal property that is subject to a security interest".

2 Under s. 11(1) of the *PPSA*, a security interest is not enforceable against a third party unless the requirements of the *PPSA* for "attachment" are met. Attachment occurs when: (1) the creditor takes possession of the collateral or enters into a written security agreement with the debtor; (2) the agreement is signed by the debtor; and (3) the agreement contains a description of the collateral enabling it to be identified. In addition, "value" or consideration for the agreement must be given by the creditor and the debtor must have "rights" in the collateral.

3 A security interest in investment property may now be perfected by control of the collateral under subsection 1 (2). *Securities Transfer Act, 2006*, S.O. 2006, c. 8, s. 123(9).

4 There are a number of exceptions to the general priority rules contained in s. 30 with which we are not concerned. One exception is a Purchase Money Security Interest (PMSI) in inventory.

5 Unless otherwise indicated, where the term "receiver" is used in these reasons, it is used to refer to an interim receiver appointed by the court under s. 47 of the *BIA*.

6 The motion judge held that the refund was a receivable that was not capable of being possessed. This aspect of the motion judge's decision is not under appeal. I make no comment as to the correctness of the motion judge's conclusion.

7 Section 48(3) reads:
(3) Where a security interest is perfected by registration and the secured party learns that the name of the debtor has changed, the security interest in the collateral becomes unperfected thirty days after the secured party learns of the change of name and the new name of the debtor unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

8 A financing change statement cannot be used to reperfect a lapsed security interest. A fresh financing statement is required. See s. 52(2) of the *PPSA*.

9 The relevant provisions of s. 20 provide:
20 (1) Except as provided in subsection (3), until perfected, a security interest,
(b) in collateral is not effective against a person who represents the creditors of the debtor, including an assignee for the benefit of creditors and a trustee in bankruptcy;

. . . . .

(2) The rights of a person,

. . . . .

(b) under clause 1(b) in respect of the collateral are to be determined as of the date from which the person's representative status takes effect.

10 Section 30(6) reads:
Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

11 The exception in subs. (3) is not relevant on this appeal.

12 The most common formulation is: "A security interest... in collateral is not effective against (i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or (ii) a liquidator appointed under the *Winding-up Act (Canada)* if the security interest is unperfected at the date that the winding-up order is made..." as found, for example in Manitoba's *Personal Property Security Act*, C.C.S.M. c. P. 35, s. 20(b).

13 Subsection (3) deals with purchase-money security interests, and its exception is not relevant here.

14 McLaren goes on to comment that the 1992 amendments to the *BIA* brought with them regulation of receivers where a debtor is insolvent. He observes that federal bankruptcy legislation has increased the control and accountability of these privately-appointed receivers. He raises the possibility that in light of these statutory changes, privately-appointed receivers will also be held to be representatives of the creditors within the meaning of s. 20(1)(b) of the Act. Ziegel and Denomme, *supra*, query at p. 163 whether Ontario law would recognize a category of creditors' representatives who do not owe their status to statutory authority. In this case, we are not concerned with a privately-appointed receiver but a court-appointed interim receiver who derived his status from the *BIA*.

15 If in fact PWC is acting as a representative of the Bank alone, it seems it would have been under a duty to apply to the court to lift the stay to permit it to register a financing change statement on behalf of the Bank.

16 For example, the decision in *RoyNat Inc. v. Ja-Sha Trucking & Leasing Ltd.*, [1991] 6 W.W.R. 764 (Man. Q.B.), aff'd (1992), 94 D.L.R. (4th) 611 (Man. C.A.), discussed by Feldman J.A., not only deals with differently worded legislation, it is a case decided under the *BIA* prior to the 1992 amendments creating the s. 47 *BIA* interim receiver.

17 Section 30(1) reads:
30. (1) If no other provision of this Act is applicable, the following priority rules apply to security interests in the same collateral:
1. Where priority is to be determined between security interests perfected by registration, priority shall be determined by the order of registration regardless of the order of perfection.
2. Where priority is to be determined between a security interest perfected by registration and a security interest perfected

otherwise than by registration,
i. the security interest perfected by registration has priority over the other security interest if the registration occurred before the perfection of the other security interest, and
ii. the security interest perfected otherwise than by registration has priority over the other security interest, if the security interest perfected otherwise than by registration was perfected before the registration of a financing statement related to the other security interest.
3. Where priority is to be determined between security interests perfected otherwise than by registration, priority shall be determined by the order of perfection.
4. Where priority is to be determined between unperfected security interests, priority shall be determined by the order of attachment.

18 Iacobucci J. also considered the meaning of the phrase "rights in goods" in s. 12(2) of B.C.'s *PPSA* dealing with leased goods. He concluded that a lessee had a proprietary interest in such goods (at para 36):
I note that s. 12(2) of the *PPSA* also recognizes that a lessee obtains a proprietary interest in leased goods. Section 12(2) states explicitly that a debtor has rights in goods leased to the debtor...when he obtains possession of them in accordance with the lease. [Emphasis in original.]

19 For ease of reference, ss. 20(1)(c) and (d) read:
20 (1) ...until perfected, a security interest,
. . . .
(c) in chattel paper, documents of title, instruments or goods is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value and receives delivery thereof without knowledge of the security interest;
(d) in intangibles other than accounts is not effective against a transferee thereof who takes under a transaction that does not secure payment or performance of an obligation and who gives value without knowledge of the security interest.

20 Section 30(6) reads:
(6) Where a security interest that is perfected by registration becomes unperfected and is again perfected by registration, the security interest shall be deemed to have been continuously perfected from the time of first perfection except that if a person acquired rights in all or part of the collateral during the period when the security interest was unperfected, the registration shall not be effective as against the person who acquired the rights during such period.

21 The importance of control is emphasized in Ontario's new *Securities Transfer Act, 2006* (*STA*), S.O. 2006, c.8 which came into force on January 1, 2007 together with related *PPSA* amendments. In addition to registration and perfection, a new, third, method of perfecting a security interest is by control of the security which can include an intangible interest. John Cameron, in his article on the *STA*, 22 B.F.L.R. 309-352 at 321, states, "As the Comment notes, obtaining 'control' means a secured party has taken whatever steps are necessary to place itself in a position where it can have the securities sold, without further action by the owner." The secured party need not have exclusive control over the security. Other secured parties can have a concurrent right and a debtor can retain rights in the security.

22 I acknowledge that in some cases, a secured creditor's failure to comply with s. 48(3) during a s. 47 *BIA* receivership could result in a loss of that party's priority depending on the nature of the court order appointing the interim receiver. The role of the s. 47 *BIA* receiver is very much defined by the terms of the court order appointing the receiver and the common law describing its role. As Farley J. noted in *Curragh, supra*, at para. 6, the regime providing for the appointment of a s. 47 *BIA* receiver is a flexible one and the court is empowered to give directions to the interim receiver that can meet the practical demands of any given case. If then, for example, the court did not order a stay of all actions on the appointment of a s. 47 *BIA* receiver, then this would affect the extent to which the particular s. 47 *BIA* receiver qualifies as "a person who represents the creditors of the debtor" within the meaning of s. 20(1)(b). Also, if for some reason the s. 47 receivership ended before there was any priority conflict, then the failure to reregister could well have consequences following the debtor's emergence from receivership. In other words, the significance of a failure to reregister will depend on a number of relevant factors in each case.

23 Other powers included the following: to take control of the property to preserve, protect, and liquidate it; to manage and carry on the business; to purchase or lease machinery; to receive and collect all money "now owed or hereafter owing" to the debtor; to execute transfers, conveyances, leases, bills of sale, or other documents respecting the property in the name and on behalf of the debtor; to report to, meet with and discuss with secured and unsecured creditors of the debtor deemed appropriate including offers and expressions of interest received; to apply for any vesting orders in order to convey the property; to register a copy of the Order appointing it and "any other Orders obtained by the Interim Receiver in respect of the Property against title to any or all property comprised in the Property" and; to sell, convey, or mortgage the property out of the ordinary course of business and without compliance with Part V of the *PPSA* (Ontario), or providing any other notice which a creditor or other party may be required to issue in order to dispose of the collateral of a debtor, with the approval of the Court.

24 I am under the impression that, as here, the same person often acts as a s. 47 *BIA* receiver and trustee in bankruptcy. Based on my interpretation of their roles, namely, that a s. 47 receiver owes a fiduciary duty to the creditors of the debtor and its function is similar to that of a trustee in bankruptcy, a trustee in bankruptcy is not a third party vis-à-vis the s. 47 receiver who also represents those same creditors. Thus, I see no conflict in the same person fulfilling both roles. To hold otherwise and to open the door to a potential for conflict between the role of the s. 47 receiver and a trustee in bankruptcy would result in the same person ordinarily not being able to fulfill both roles with attendant increased expense, duplication of effort, and delay.

25 A proceeding is any step that must be taken before a creditor or the creditor's representative can enforce its rights and may include the delivery of a copy of a certificate: *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at para. 26.

26 McLaren, *supra*, at p. 172, in discussing s. 20(1)(b) and *Giffen*, writes that the wording of the B.C. Act on debtor security interests is very different from Ontario's s. 20(1)(b).

27 Nor did either re-perfect under s. 30(6) of the *PPSA*, discussed below.

28 Subsection 26(2) of the *PPSA* provides that a "security interest in collateral in the possession of a person, other than the debtor, the debtor's agent or a bailee mentioned in subsection (1), is perfected by, (a) issuance of a document of title in the name of the secured party; (b) possession on behalf of the secured party; or (c) registration." No appeal was taken from this finding.

29 Whether a particular representative of creditors, other than a receiver, may be included in s. 20(1)(b) need not be decided in this case.

30 Although a court-appointed receiver owes duties to the court and to the creditors in respect of the proper conduct of the receivership (see for example *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.) at paras. 28-30), it is interesting to compare ss. 47(3) and 47.1(3) of the *BIA*. Under the first subsection, an interim receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of the creditor who sought the appointment, while under the second subsection, the receiver can only be appointed if it is necessary to protect the debtor's estate or the interests of one or more creditors or the creditors generally. The difference may impact on the particular receiver's duties as a representative of creditors.

31 In Quebec there is a different regime. See *Lefebvre, Re*, [2004] 3 S.C.R. 326 (S.C.C.) at paras. 19-40, where the Supreme Court of Canada discusses the regime in Quebec.

32 See *Personal Property Security Act*, R.S.B.C. 1996, c. 359, s. 20(b); *Personal Property Security Act*, R.S.A. 2000, c. P-7, s. 20(a); *Personal Property Security Act*, S.S. 1993, c. P-6.2, s. 20(2)(b); *Personal Property Security Act*, C.C.S.M. c. P35, s. 20(b); *Personal Property Security Act*, S.N.S. 1995-96, c. 13, s. 21(2); *Personal Property Security Act*, S.N.B. 1993, c. P-7.1, s. 20(2); *Personal Property Security Act*, R.S.P.E.I. 1988, c. P-3.1, s. 20(2); *Personal Property Security Act*, S.N.L. 1998, c. P-7.1, s. 21(1).

33 The equivalent provision of Manitoba's statute now reads:

20. A security interest

. . . . .

(b) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy, or

(ii) a liquidator appointed under the *Winding-up Act* (Canada) if the security interest is unperfected at the date that the winding-up order is made.

Personal Property Security Act, C.C.S.M. c. P.35.

34 The judge is referring only to ss. 20(a)(i), not 20(a)(ii), which also lists a liquidator under the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11.

35 Section 71 of the *BIA* is set out above at para. 24. Section 69.4 of the *BIA* allows the court to declare that sections that freeze rights do not apply to a particular creditor if that creditor is likely to be materially prejudiced by the continued operation of the sections or it is otherwise equitable to make such a declaration. It is unlikely that this section could be used to assist an unperfected secured creditor because such a person is always going to be prejudiced by the operation of s. 20(1)(b) of the *PPSA*. As this court has held in *Ma, Re* (2001), 143 O.A.C. 52 (Ont. C.A.) at paras. 2 and 3, 'The role [of the courts under s. 69.4] is one of ensuring that sound reasons, consistent with the scheme of the [*BIA*] exist for relieving against the otherwise automatic stay.... [L]ifting the automatic stay is far from a routine matter.' [Citations omitted.] In most instances, a lift stay is ordered under s. 69.4 where (a) the proceeding in respect of which the lift is requested is one in relation to which the debtor's liability would not be released by an order of discharge from bankruptcy, or (b) where the bankrupt "is a necessary party for the completed adjudication" of the relevant proceeding: see *Koval, Re* (2003), 48 C.B.R. (4th) 103 (Ont. S.C.J.) at para. 6.

Tab 3

2014 ONCA 851
Ontario Court of Appeal

Bank of Nova Scotia v. Diemer

2014 CarswellOnt 16721, 2014 ONCA 851, 20 C.B.R. (6th) 292, 247 A.C.W.S. (3d) 584, 327 O.A.C. 376

The Bank of Nova Scotia, Plaintiff (Respondent) and Daniel A. Diemer o/a Cornacre Cattle Co., Defendant (Respondent)

Alexandra Hoy A.C.J.O., E.A. Cronk, Sarah E. Pepall JJ.A.

Heard: June 10, 2014
Judgment: December 1, 2014
Docket: CA C58381

Proceedings: affirming *Bank of Nova Scotia v. Diemer* (2014), 2014 ONSC 365, 2014 CarswellOnt 666, A.J. Goodman J. (Ont. S.C.J.)

Counsel: Peter H. Griffin for Appellant, PricewaterhouseCoopers Inc.
James H. Cooke for Respondent, Daniel A. Diemer
No one for Respondent, The Bank of Nova Scotia

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors

VII Receivers
  VII.8 Remuneration of receiver
    VII.8.b Remuneration
      VII.8.b.iii Miscellaneous

Headnote

Debtors and creditors --- Receivers — Remuneration of receiver — Remuneration — Miscellaneous

Counsel fees — Bank held security over debtor's cattle farm operations, and was owed approximately $2,000,000 — On application by bank, receiver was appointed — Receiver requested legal fees of $255,955 on behalf of its counsel — Motion judge found legal fees were excessive, given size of receivership, and refused to approve them — Motion judge assessed fees at $157,500, plus disbursements of $4,434.92 — Receiver appealed — Appeal dismissed — Motion judge did not err in disallowing counsel's fees — Initial appointment order stating that counsel was to be compensated at "standard rates", and subsequent approval of receiver's reports, did not oust need for court to consider whether fees claimed were fair and reasonable — Motion judge made no palpable and overriding error in concluding that counsel's fees were not fair and reasonable — It was inappropriate for motion judge to simply apply rates of London counsel, but this was not fatal — Motion judge was informed by correct principles, which led him to conclude fees lacked proportionality and reasonableness — Certain comments made by motion judge were not justified, but different result should not ensue.

Table of Authorities

Cases considered by *Sarah E. Pepall J.A.*:

Belyea v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27, 46 C.B.R. (N.S.) 244 (N.B. C.A.) — followed

BT-PR Realty Holdings Inc. v. Coopers & Lybrand (1997), 29 O.T.C. 354, 1997 CarswellOnt 1246 (Ont. Gen. Div. [Commercial List]) — referred to

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 164 O.A.C. 84, 36 C.B.R. (4th) 200, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — followed

Confectionately Yours Inc., Re (2003), 2003 CarswellOnt 1043, 2003 CarswellOnt 1044, 312 N.R. 195 (note), 41 C.B.R. (4th) 28, 181 O.A.C. 197 (note) (S.C.C.) — referred to

HSBC Bank Canada v. Lechier-Kimel (2014), 2014 CarswellOnt 14539, 2014 ONCA 721 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 243(1) — pursuant to

s. 248(2) — considered

s. 243(6) — pursuant to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

APPEAL by receiver from judgment reported at *Bank of Nova Scotia v. Diemer* (2014), 2014 ONSC 365, 2014 CarswellOnt 666 (Ont. S.C.J.), refusing to approve counsel fees in amount sought by receiver.

***Sarah E. Pepall J.A.*:**

1 The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

2 This appeal involves a motion judge's refusal to approve legal fees of $255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

3 For the reasons that follow, I would dismiss the appeal.

Facts

(a) Appointment of Receiver

4 The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium Financial Services Inc. were owed approximately $4.9 million (approximately $2 million and $2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

5 On August 20, 2013, Carey J. granted the request and appointed PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") as receiver of the debtor. The initial appointment order addressed various aspects of the receivership. This included the duty of the debtor to cooperate with the Receiver and the approval of a sales process for the farm operations described in materials filed in court by BNS. The order also contained a come-back provision allowing any interested party to apply to vary the order on seven days' notice.

6 Paragraphs 17 and 18 of the appointment order, which dealt with the accounts of the Receiver and its counsel, stated:

> 17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
>
> 18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

There is no suggestion that the materials filed in support of the request for the appointment of the Receiver provided specifics on the standard rates and charges referred to in para. 17 of the initial appointment order.

7 Counsel to the Receiver was Borden Ladner Gervais LLP ("BLG") and the lead lawyer was Roger Jaipargas. Mr. Jaipargas was called to the Ontario bar in 2000, practises out of BLG's Toronto office, and is an experienced and capable insolvency practitioner. Among other things, at the time of the receivership, he was the Chair of the Insolvency Section of the Ontario Bar Association.

(b) Receiver's Activities

8 The activities of the Receiver and, to a certain extent, those of its counsel, were described in reports dated September 11 and October 15, 2013 filed in court by the Receiver. Both reports were subsequently approved by the court.

9 The reports revealed that:

• Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.

• After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of $8.3 million. The purchase price included 170 milking cows.

• On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.

• The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.

• The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.

• The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

10 After approximately two months, the debtor asked that the Receiver be replaced. Accordingly, PWC brought a motion to substitute BDO Canada Ltd. as receiver and to approve

its second report dated October 15, 2013.

(c) Application to Approve Fees

11 The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

12 The Receiver's fees amounted to $138,297 plus $9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of $338.38. The highest hourly rate charged by the Receiver was $525 per hour. Fees estimated to complete were $20,000.

13 The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to $255,955, plus $4,434.92 in disbursements and $33,821.69 in taxes for a total account of $294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of $643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of $750.00. The rates of the other 10 people on the account ranged from $950 per hour for a senior lawyer to $195 for a student and $330 for a law clerk.

14 Fees estimated to complete were $20,000.

15 In support of the request for approval of both sets of accounts, the Receiver filed an affidavit of its own representative and one from its counsel, Mr. Jaipargas.

16 As is customary in receiver fee approval requests, the Receiver's representative stated that, to the best of his knowledge, the rates charged by its counsel were comparable to the rates charged by other law firms for the provision of similar services and that the fees and disbursements were fair and reasonable in the circumstances.

17 In his affidavit, Mr. Jaipargas attached copies of BLG's accounts and a summary of the hourly rates and time spent by the eleven BLG timekeepers who worked on the receivership. The attached accounts included detailed block descriptions of the activities undertaken by the BLG timekeepers with total daily aggregate hours recorded. Usually the entries included multiple tasks such as e-mails and telephone calls. Time was recorded in six minute increments. Of the over 160 docket entries, a total of 11 entries reflected time of .1 (6 minutes) and .2 (12 minutes).

18 On October 23, 2013, the motion judge granted a preliminary order. He ordered that:

• BDO Canada Ltd. be substituted as receiver;

• PWC's fees and disbursements be approved;

• the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;

• $100,000 of BLG's fees be approved; and

• the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

19 Prior to the January return date, the debtor filed an affidavit of a representative from his law firm. The affiant described the billing rates of legal professionals located in the cities of London and Windsor, Ontario. These rates tended to be significantly lower than those of BLG. For example, the highest billing rate was $500 for the services of a partner called to the bar in 1988. Mr. Jaipargas replied with an affidavit that addressed Toronto rates in insolvency proceedings in Toronto with which BLG's rates compared favourably. He also revised BLG's estimate to complete to $30,000.

Motion Judge's Decision

20 On January 3, 2014, the motion judge heard the motion relating to approval of the balance of BLG's fees and disbursements. He refused to grant the requested fee approval and provided detailed reasons for his decision dated January 22, 2014.

21 In his reasons, the motion judge considered and applied the principles set out in *Confectionately Yours Inc., Re* (2002), 164 O.A.C. 84 (Ont. C.A.) [hereinafter Bakemates], leave to appeal refused, (2003), [2002] S.C.C.A. No. 460 (S.C.C.) (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]); and *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (N.B. C.A.). The motion judge considered the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

22 The motion judge took into account the challenges identified by the Receiver in dealing with the debtor. However, he found that the debtor had co-operated and that there was little involvement by the Receiver and counsel that required either day-to-day management or identification of a potential purchaser.

23 He noted, at para. 17 of his reasons, that although counsel for the debtor took specific

issue with BLG counsel's rates: "I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension — the hours) submitted for reimbursement."

24 The motion judge considered the hourly rates, time spent and work done. He noted that the asset was a family farm worth approximately $8.3 million and that the scope of the receivership was modest. In his view, the size of the receivership estate should have some bearing on the hourly rates. He determined that the amount of counsel's efforts and the work involved was disproportionate to the size of the receivership. After the size of the estate became known, the usual or standard rates were too high. He expressly referred to paras. 17 and 18 of the initial appointment order.

25 The motion judge also took issue with the need for, and excessive work done by, senior counsel on routine matters. He rejected the Receiver's opinion endorsing its counsel's fees, found that the number of hours reflected a significant degree of inefficiency, and that some of the work could have been performed at a lower hourly rate. He concluded: "I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable."

26 He acknowledged that there were several methods to achieve what he believed to be a just and reasonable amount including simply cutting the overall number of hours billed. Instead, so as to reduce the amount claimed, he adopted the average London rate of $475 for lawyers of similar experience and expertise as shown in the affidavit filed by the debtor. He also expressly limited his case to the facts at hand, noting that his reasons should not be construed as saying that Toronto rates have no application in matters in the Southwest Region.

27 The motion judge concluded that BLG's fees were "nothing short of excessive." He assessed them at $157,500 from which the $100,000 allowed in his October 23, 2013 order was to be deducted. He also allowed disbursements of $4,434.92 and applicable HST.

Grounds of Appeal

28 The appellant advances three grounds of appeal. It submits that the motion judge erred: (1) by failing to apply the clear provisions of the appointment order which entitled BLG to charge fees at its standard rates; (2) by reducing BLG's fees in the absence of evidence that the fees were not fair and reasonable; and (3) by making unfair and unsupported criticisms of counsel.

Burden of Proof

29 The receiver bears the burden of proving that its fees are fair and reasonable: *HSBC Bank Canada v. Lechier-Kimel*, 2014 ONCA 721 (Ont. C.A.), at para. 16 and *Bakemates*, at para. 31.

Analysis

(a) Appointment of a Receiver

30 Under s. 243(1) of the *BIA*, the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just. As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

31 The receiver is an officer of the court: *Bakemates*, at para. 34. As stated by McElcheran, at p.186:

> The receiver, once appointed, is said to be a "fiduciary" for all creditors of the debtor. The term "fiduciary" to describe the receiver's duties to creditors reflects the representative nature of its role in the performance of its duties. The receiver does not have a financial stake in the outcome. It is not an advocate of any affected party and it has no client. As a court officer and appointee, the receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. [Footnotes omitted.]

(b) Passing of a Receiver's Accounts

32 In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:

> The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

33 The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea*: *Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

34 In Canada, very little has been written on professional fees in insolvency proceedings: see Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost' Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 141, at p. 151.

35 Having said that, it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins in the *Bakemates* analysis. However, in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

36 There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover,

there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

(c) The Rise and Dominance of the Billable Hour

37 For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

38 The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association ("ABA")'s Special Commission on the Economics of Law Practice published a study entitled "The 1958 Lawyer and his 1938 Dollar". The study noted that lawyers' incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers' profits: see Stuart L. Pardau, "*Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated*" (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, at p. 2. And that was in 2002.

39 Typically, a lawyer's record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

40 This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

(d) Fees in Context of Court Appointed Receiver

41 The cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. In contrast, the cost of putting together many of the transactions that then become unravelled in court insolvency proceedings rarely attract the public scrutiny that

professional fees in insolvencies do. While many of the principles described in these reasons may also be applicable to other areas of legal practice, the focus of this appeal is on legal fees in an insolvency.

42 Bilateral relationships are not the norm in an insolvency. In a traditional solicitor/client relationship, there are built-in checks and balances, incentives, and, frequently, prior agreements on fees. These sorts of arrangements are less common in an insolvency. For example, a receiver may not have the ability or incentive to reap the benefit of any pre-agreed client percentage fee discount of the sort that is incorporated from time to time into fee arrangements in bilateral relationships.

43 In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

44 In a receivership, the duty to monitor legal fees and services in the first instance is on the receiver. Choice of counsel is also entirely within the purview of the receiver. In selecting its counsel, the receiver must consider expertise, complexity, location, and anticipated costs. The responsibility is on the receiver to choose counsel who best suits the circumstances of the receivership. However, subsequently, the court must pass on the fairness and reasonableness of the fees of the receiver and its counsel.

45 In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, *all* the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

46 It is not my intention to introduce additional complexity and cost to the assessment of legal fees in insolvency proceedings. All participants must be mindful of costs and seek to minimize court appearances recognizing that the risk of failing to do so may be borne on their own shoulders.

(e) Application to This Case

47 Applying these principles to the grounds raised, I am not persuaded that the motion judge erred in disallowing counsel's fees.

48 The initial appointment order stating that the compensation of counsel was to be paid at standard rates and the subsequent approval of the Receiver's reports do not oust the need for the court to consider whether the fees claimed are fair and reasonable.

49 As stated in *Bakemates*, at para. 53, there may be cases in which the fees generated by the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors so requires. Furthermore, although they would not have been determinative in any event, there is no evidence before this court that the standard rates were ever disclosed prior to the appointment of the receiver. In addition, as stated, while the receiver and its counsel may be entitled to charge their standard rates, the ultimate assessment of what is fair and reasonable should dominate the analysis. I would therefore reject the appellant's argument that the motion judge erred in disallowing BLG's fees at its standard rates.

50 I also reject the appellant's argument that the motion judge erred in fact in concluding that counsel's fees were not fair and reasonable.

51 In this regard, the appellant makes numerous complaints.

52 The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

53 While there are certain aspects of the second report indicating that some negotiation with the debtor was required, based on the facts before him, it was open to the motion judge to conclude, overall, that the debtor cooperated. The Receiver and its counsel never said otherwise. Furthermore, this finding was made in the context of the debtor having agreed to continue to operate the farm pursuant to an August 30, 2013 agreement and in the face of little involvement of the Receiver and its counsel in the day-to-day management of the farm. Indeed, in the first report, the Receiver notes the debtor's willingness to carry on the farming operations on a

day-to-day basis.

54 In my view, it was also appropriate for the motion judge to question why a senior Toronto partner had to attend court in London to address unopposed motions and, further, to find that the scope of the receivership was modest. Indeed, in his reasons at para. 40, the motion judge wrote that, in the proceedings before him, counsel for the Receiver acknowledged that the receivership was not complex. Based on the record, it was open to him to conclude that the receivership involved "the divestment of the farm and assets with some modest ancillary work."

55 As the motion judge noted at para. 20, the fixing of costs is not an unusual task for the court. Moreover, he was fully familiar with the receivership and was well-placed to assess the value generated by the legal services rendered. He properly considered the *Belyea* factors. While a different judge might have viewed the facts, including the debtor's conduct, differently, the motion judge made findings of fact based on the record and is owed deference. In my view, the appellant failed to establish any palpable and overriding error.

56 Nor did the motion judge focus his decision on what remained to the debtor after the creditors, the Receiver and Receiver's counsel had been paid, as alleged by the appellant. In para. 34 of his reasons, which is the focus of the appellant's complaint on this point, the motion judge correctly considered the size of the estate. He stated that he was persuaded that "the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership." After the size of the estate became known, he concluded that the "standard" rates of counsel were too high relative to the size. As observed in *Belyea*, at para. 9, the "nature, extent and value" of an estate is a factor to be considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

57 In addition, the motion judge was not bound to accept the affidavit evidence filed by BLG or the two Receiver reports as determinative of the fairness and reasonableness of the fees requested. It is incumbent on the court to look to the record to assess the accounts of its court officer, but it is open to a motion judge to draw inferences from that record. This is just what the motion judge did.

58 Having said that, I do agree with the appellant that there were some unfair criticisms made of counsel. There was no basis to state that counsel had attempted to exaggerate or had conducted himself in a disingenuous manner. I also agree with the appellant that the Receiver and its counsel cannot be faulted for failing to bring the accounts forward for approval at an earlier stage. Costly court appearances should be discouraged not encouraged.

59 I also agree with the appellant that it was inappropriate for the motion judge to adopt a mathematical approach and simply apply the rates of London counsel. However, this was not fatal: the motion judge's decision was informed by the factors in *Belyea*. As he noted, he would

have arrived at the same result in any event. He was informed by the correct principles, which led him to conclude that the fees lacked proportionality and reasonableness. This is buttressed by the motion judge's concluding comments, in para. 47 of his reasons, where he made it clear that the driving concern in his analysis was the "overall reasonableness of the fees" and that his decision should not be read as saying that Toronto rates have no application in matters in London or its surrounding areas.

60 While certain of the motion judge's comments were unjustified, I am not persuaded that a different result should ensue.

Disposition

61 For the foregoing reasons, I would dismiss the appeal. As agreed, the appellant shall pay the respondent's costs of the appeal, fixed in the amount of $5,500, together with disbursements and all applicable taxes.

Alexandra Hoy A.C.J.O.:
I agree

E.A. Cronk J.A.:
I agree

Appeal dismissed.

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BRIDGING FINANCE INC., AS AGENT FOR SPROTT BRIDGING INCOME FUND LP
Applicant

-and-

THOMAS CANNING (MAIDSTONE) LIMITED AND 692194 ONTARIO LIMITED
Respondent

Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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BOOK OF AUTHORITIES OF THE RESPONDING PARTY (on behalf of the Creditor, ROL-LAND FARMS and GREENHOUSES INC.)

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