ASSESSING SUCCESSOR EMPLOYER LIABILITIES IN INSOLVENCY PROCEEDINGS

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INTRODUCTION

One of the first and most difficult questions to be answered in any insolvency proceeding is how best to maximize value for all stakeholders. In the case of a bankruptcy or Court supervised receivership[2], the trustee in bankruptcy or receiver must quickly determine the relative costs and benefits of carrying on the business of the insolvent debtor as opposed to immediately terminating its business operations. The potential liabilities which may be imposed upon a Court-appointed officer which carries on the debtor's business are often significant and in many cases prohibitive. Until recently, it was standard practice to include in orders appointing receivers (and orders delineating the duties of a trustee in bankruptcy) a provision insulating the receiver or trustee from any successor employer liabilities in the event it employed any of the debtor's former employees or carried on the business of the debtor. Two recent decisions of the Ontario Court of Appeal have considered the Court's ability to insulate receivers and trustees from successor employer liabilities and addressed the interplay of the *Bankruptcy and Insolvency Act*[3] and the Ontario *Labour Relations Act*[4].

THE STANDARD ORDER

In *GMAC Commercial Credit Corp.-Canada* v. *TCT Logistics Inc.*[5], the order appointing the interim receiver contained the following standard language with respect to the termination of the employees of the debtor and the insulation of the interim receiver from successor employer liabilities:

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[2] Throughout this paper, a reference to a "receiver" includes a receiver or receiver and manager appointed pursuant to the *Courts of Justice Act* R.S.O. 1990, c. 43, as amended and an interim receiver appointed pursuant to the *Bankruptcy and Insolvency Act* (Canada), R.S.C. 1985, c.B-3, as amended.

[3] *Bankruptcy and Insolvency Act*, R.S.C., 1985 c. B-3, as amended ("BIA")

[4] *Labour Relations Act*, 1985, S.O. 1995, c. 1, Schedule A, as amended ("OLRA").

[5] (2003), 42 C.B.R. (4th) 221 (Ont. S.C.J.) [hereinafter *TCT Logistics*].

> **THIS COURT ORDERS** that the employment of the Debtors, including employees on maternity leave, disability leave and all other forms of approved absence is hereby terminated effective immediately prior to the appointment of the Receiver. Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the Receiver is not and shall not be deemed or considered to be a successor employer, related employer, sponsor or payor with respect to any of the employees of any of the Debtors or any former employees with the meaning of the *Labour Relations Act* (Ontario), the *Employment Standards Act* (Ontario), the *Pensions Benefits Act* (Ontario), *Canada Labour Code*, *Pension Benefits Standards Act* (Canada) or any other provincial, federal or municipal legislation or common law governing employment or labour standards (the "Labour Laws") or any other statute, regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between any of the Debtors and any of their present or former employees, or otherwise. In particular, the Receiver shall not be liable to any of the employees of the Debtors for any wages (as "Wages" are defined in the *Employment Standards Act* (Ontario)), including severance pay, termination pay and vacation pay, except for such wages as the Receiver may specifically agree to pay. The Receiver shall not be liable for a contribution or other payment to any pension or benefit fund.

In *Royal Crest Lifecare Group, (Re)*[6], the petitioning creditor sought to incorporate similar provisions into an Order addressing the scope of the trustee in bankruptcy's powers.

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[6] (2003), 40 C.B.R. (4th) 146 (Ont. S.C.J.) [hereinafter *Royal Crest*].

HOW A COURT OFFICER BECOMES A SUCCESSOR EMPLOYER

A Court-appointed officer such as a receiver or trustee which carries on the debtor's business may become a "successor employer" for the purposes of certain federal and provincial labour relations statutes[7]. The scope of these liabilities are addressed in more detail below.

In Ontario, the OLRA establishes and regulates the manner in which a trade union becomes certified as the bargaining agent of the employees of an employer. A collective agreement between the employer and the trade union sets out the terms or conditions of employment and the respective rights and duties of the employer and the employees. The sale or other disposition of a business that is subject to a collective agreement between the employer and the trade union does not extinguish the rights of the employees under the collective agreement. In these circumstances, subsection 69(2) of the OLRA provides that if a "sale" of a business takes place, the purchaser thereof will be bound by the collective agreement as if it were the original employer thereunder. In short, the purchaser becomes a "successor employer" for the purposes of the OLRA:

Sale of Business

> 69(1) In this section, ... "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

Successor Employer

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

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[7] This paper only examines the impact of the OLRA, although the provisions of that statute are mirrored by many of the other provincial labour statutes.

> business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

The Courts and Labour Relations Boards have broadly interpreted what constitutes the "sale" of a business for the purposes of successor employer status. For example, in *C.U.P.E.* v. *Deloitte & Touche Inc.* the Ontario Labour Relations Board (the "OLRB") noted that "sale or other manner of disposition" means something very different in the labour relations context of a sale of a business than it does in its ordinary or commercial law sense[8]. In that case, the OLRB determined that a Court-appointed receiver and manager was a successor employer for the purposes of the OLRA. The Courts have adopted this expansive definition in order to protect the remedial nature of the successor employer provisions under labour relations statutes. In *W.W. Lester (1978) Ltd.* v. *U.A., Local 740* Madam Justice Wilson identified the purpose of these provisions in labour relations statutes as follows:

> [...] the provisions exist to protect collective bargaining agreements from becoming meaningless due to, *inter alia,* the manipulation of the corporate form by employers. Such manipulation can be accomplished by a variety of means [...][9]

Madam Justice McLachlin in *W.W. Lester* identified a number of factors to be considered when determining whether a purchaser of a business should be found to be a successor employer. Justice McLachlin stated those considerations as follows:

> To determine whether or not the business or part of the business has been disposed of, most boards examine the nature of the predecessor business, and the nature of the successor business determines if the business of the predecessor is being performed by the successor. Most boards approach the issue by examining the factors like the work covered by the terms of the collective agreement, the type of assets that have been transferred, whether

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[8] [1993] O.L.R.D. No. 458 at p. 6 [hereinafter *Deloitte &Touche*].
[9] [1990] 3 S.C.R. 644 [hereafter *W.W. Lester*] at p.652.

> goodwill has been transferred, whether employees are transferred, whether the business is operating in the same location, whether there is continuity of management, and whether there is continuity of the work performed [...]. No single factor is determinative [...]. In each case the Board must determine if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor. Because a business is not merely a collection of assets, the vital consideration "is whether the transferee has acquired from the transferor a functional economic vehicle".[10]

Pursuant to subsection 69(12) and subsection 114(1) of the OLRA, the OLRB has exclusive jurisdiction to determine if the sale of a business has taken place[11]. As set out in more detail below, the Court of Appeal recently confirmed the exclusive jurisdiction of the OLRB to make this determination.

WHAT IT MEANS TO BE A SUCCESSOR EMPLOYER

As noted above, if the OLRB determines that a sale of the business has taken place, then the purchaser of the business shall be considered a party to the collective agreement (a successor employer) as if it had been the original party thereto. Therefore, the successor employer inherits all of the obligations and duties of the employer set out in the collective agreement[12].

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[10] *Ibid.* at p. 676.

[11] Subsection 114(1) of the OLRA provides as follows:
The Board has exclusive jurisdiction to determine the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

[12] The OLRB in *Emrick Plastics. Inc.*, [1982] O.L.R.B. Rep. 861 at para. 18 described the obligations of a successor employer as follows:
We conclude...that section 63(2)[now section 69(2)] of our own Act continues the effect of a collective agreement over a sale transaction *without hiatus*, and that the purchaser stands literally in the shoes of its predecessor with respect to any rights or obligations under that agreement. The purchaser, in other words, is given no opportunity to "weed out undesirable employees" contrary to the provisions of the collective agreement, nor to decline to recognize any of the seniority or other rights accrued by employees under the collective agreement during their tenure with the predecessor employer. We agree

For the purposes of the OLRA, the transition between employers through the sale of the business should be seamless. As a result, absent any other legislation to the contrary, a successor employer will inherit, among other things, all of the prior employer's liabilities and obligations relating to such things as termination and severance pay, grievance procedures, funding of pension plans, payment of union dues, funding of any pay equity awards and adherence to seniority rights.

In addition to the obligations and liabilities imposed by the OLRA, there are numerous other provincial statutes which address specific aspects of the employer-employee relationship and which may also impose liabilities upon a Court-appointed officer as a successor employer.

For example, under the *Employment Standards Act, 2000*[13] an employer is defined to include a receiver or trustee of an activity. The ESA provides a test similar to the one contained in the OLRA to determine if a "sale" of a business has taken place[14].

If a trustee or court appointed receiver was found to be a successor employer under the OLRA, it would likely be a successor employer under the ESA. Employer obligations arising under the ESA include vacation pay, termination pay and severance pay. Thus, absent any other legislation, a Court officer which engaged the former employees of the debtor on a temporary basis might be liable to those employees for vacation pay, termination pay and severance pay based on the period of time those employees were

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with counsel for the respondent that the purchaser takes the business *exactly* as he receives it from the vendor. Even if, for example, employees have been given notice of termination by the *vendor*, the purchaser is no more entitled to start that business up without regard to the recall rights of employees under the collective agreement then the vendor would have been. The obligations of either employer are determined by whether the employer on its own chose to treat a severance at a given point in time as a termination or a lay off.

[13] *Employment Standards Act, 2000*, S.O. 2000, c.41 ("ESA")

[14] The ESA provides as follows:

9.1 If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.

9.3 In this section, "sells" includes leases, transfers or disposes of in any other manner, and "sale" has a corresponding meaning.

engaged by both the Court officer as well as the debtor, and not just the period of time those employees were engaged by the Court officer.

Similarly, under the *Pay Equity Act*[15] the definition of a "sale" of a business mirrors the definition contained in the OLRA[16]. As a result, a receiver or trustee could become liable upon its appointment to fund any compensation adjustments under a pay equity plan which the insolvent debtor was required to make as at the date of the Court officer's appointment.

In contrast, under the *Workplace Safety and Insurance Act 1997*[17] a trustee in bankruptcy and a receiver are excluded from the obligations placed on successor employers by section 146 of the Act which provides as follows:

> 146(1) This section applies when an employer sells, leases, transfers or otherwise disposes of all or part of the employer's business either directly or indirectly to another person other than a trustee in bankruptcy under the *Bankruptcy and Insolvency Act* (Canada), a receiver, a liquidator under the *Winding-Up Act* (Canada) or a person who acquires any or all of the employer's business pursuant to an arrangement under the *Companies' Creditors Arrangement Act* (Canada).
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> (2) The person is liable to pay all amounts owing under this Act by the employer immediately before disposition.

A trustee or receiver may also fall within the definition of "employer" contained in the *Pension Benefits Act*[18] if any former employees of the debtor engaged by the receiver or trustee receives remuneration from the receiver or trustee related to a pension plan regulated by the PBA. The PBA defines an employer as follows:

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[15] *Pay Equity Act*, R.S.O. 1990, c. P.7 ("PEA").

[16] The PEA provides as follows:
13.1(1) If any employer who is bound by a pay equity plan sells a business, the purchaser shall make any compensation adjustments that were to be made under the plan in respect of those positions in the business that are maintained by the purchaser and shall do so on the date on which the adjustments were to be made under the plan.
13.1(5) In this section, …"sells" includes leases, transfers and any other manner of disposition.

[17] *Workplace Safety and Insurance Act 1997*, S.O. 1997, c. 16, Sch. A.

[18] *Pension Benefits Act,* R.S.O. 1990, c. P.8 ("PBA").

1. In this Act…

"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.

In *Re St. Mary's Paper Inc.*[19], a trustee in bankruptcy operated the debtor's business and entered into agreements with union and non-union employees. The trustee agreed to continue to deduct employee pension plan contributions, remit those contributions to the plan's trustee and to pay the plan's current service costs. However, the trustee made it clear that it would not be responsible for, among other things, any unfunded pension liabilities. The employees agreed to these arrangements. After the trustee advised the Pension Commission of Ontario that it would not administer the pension plans, an administrator was appointed which then advised the trustee that by hiring the bankrupt's employees and making contributions to the pension plans, the trustee had become an employer under the PBA and was therefore liable for certain unfunded liabilities under the plans. The Court of Appeal confirmed that the trustee was in fact an "employer" under the PBA as the trustee had paid the employees remuneration to which the relevant pension plan was related.

It is also important to note that in circumstances in which a receiver or trustee would be considered a successor employer under the relevant legislation, the sale of the debtor's business does not necessarily extinguish such liability. In *Crown Zellerbach Canada Ltd. (Ladysmith Division) and Pacific Logging Company Limited and International Woodworkers of America Local 1-80*[20], the B.C. Labour Relations Board held that the

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[19] (1994), 19 O.R. (3rd) 163 (C.A.) [hereinafter *St. Mary's*].

[20] (1982), Q.L. No. 57-82 (B.C.L.R.B.) [hereinafter *Crown Zellerbach*]. See also *Cadillac Fairview Corp.*, [1997] O.L.R.D. 1780 at p. 7 in which the OLRB stated that the deemed sale of a business did not terminate the union's bargaining rights with the vendor nor "wipe out" the collective agreement between the union and the vendor, notwithstanding that there were no employees in the bargaining unit following the sale. The Board held that the sale of the business effectively created a separate collective agreement between the purchaser and the union, with the result that there are then two collective agreements and two collective bargaining relationships when once there was only one.

sale of a business to a purchaser which becomes a successor employer for the purposes of labour relations legislation does not extinguish the employer liabilities of the vendor. The Board held that the successor employer provisions simply guarantee that any proceedings or bargaining rights which may have existed at the time of the sale are not extinguished by the sale such that they become obligations of the purchaser. The Board went on to hold that the purpose of the successor employer provisions is to ensure that a claim may be made not only against the purchaser but against the vendor as well.

THE DECISION IN *ROYAL CREST*

I. The Lower Court Decision

Following an unsuccessful restructuring attempt, petitions for receiving orders were issued against the Royal Crest group of companies (together "Royal Crest"). The petitioning creditor sought an order which provided, among other things, that Ernst & Young Inc. as trustee in bankruptcy (the "Trustee") would not be bound by any collective agreements between Royal Crest and the relevant unions and that the Trustee would not be deemed or considered to be a successor employer to Royal Crest with respect to any former employees of Royal Crest.

In response, certain unions, including the Canadian Union of Public Employees, sought an order of the Court pursuant to Section 215 of the BIA granting leave to commence an application before the OLRB to have the Trustee named as a successor employer to the bankrupt. The unions took the position that the OLRB and not the Bankruptcy Court has exclusive jurisdiction to determine if a trustee in bankruptcy is a successor employer. In support of this position, the unions submitted to the Court that, in accordance with Section 69 of the OLRA, the bankruptcy of an employer results in the "sale" of that employer's business within the meaning of the OLRA with the result that the trustee in bankruptcy is bound by any collective agreements in place.

The petitioning creditor and certain other affected creditors argued that the bankruptcy of Royal Crest did not result in a "sale" of Royal Crest's business to the Trustee within the meaning of the OLRA. The petitioning creditor argued that the bankruptcy effectively

terminated any collective agreements between Royal Crest and the relevant unions. In support of this proposition, the petitioning creditor relied upon the statement by Madam Justice Abella in her dissenting reasons in the Court of Appeal decision in *St. Mary's* that collective agreements terminate upon bankruptcy[21]. The petitioning creditor argued that a declaration that the Trustee was a successor employer would be inconsistent with bankruptcy law since it would interfere with the Trustee's statutory mandate to achieve the highest realization upon Royal Crest's assets, which, on the facts of this case, could only be achieved by preserving the going concern value of the business through its continued operation by the Trustee. The petitioning creditor argued that a finding by the OLRB that the Trustee was a successor employer to Royal Crest would therefore result in a conflict with the objectives of the BIA.

Mr. Justice Farley dismissed the unions' motion for leave. Justice Farley noted that it is the mandate of a trustee in bankruptcy to maximize the value of assets vested in it for the purpose of providing a dividend to the bankrupt's creditors. Justice Farley concluded that given the trustee's mandate, the operation of a bankrupt's business by the trustee is only incidental to its primary function of realizing upon the bankrupt's assets.[22]

Justice Farley resolved the unions' motion for leave by asking what role a trustee in bankruptcy is truly playing, that is, is it realizing upon the bankrupt's assets in discharge of its statutory mandate or is it simply acting as an employer:

> It seems to me that where a trustee is operating the business as incidental to the trustee disposing of it and realizing on the assets and there is no question or issue raised that it is pursuing a marketing and ultimately sale/disposition program in a reasonable and *bone fide* way with due dispatch, then the question of employment of personnel is only incidental to its function of realizing on the assets (and protecting the stakeholder interests in going concern preservation).[23]

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[21] *Supra*, note 19 at p. 181.
[22] *Royal Crest*, *supra* note 6 at p. 157.
[23] *Ibid.*

Justice Farley concluded that the relevant collective agreements were not terminated on bankruptcy but rather put into "suspended animation" to be revived if, as and when a "sale" of the business occurred to a purchaser within the meaning of the OLRA. Mr. Justice Farley dismissed the unions' motion for leave without prejudice to the motion being brought back on with the appropriate factual underpinning which would demonstrate that the Trustee had slipped from functioning "*qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities."[24]

Justice Farley also considered the impact of subsection 14.06(1.2) of the BIA, which states as follows:

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

Mr. Justice Farley concluded that, although the section was of assistance to trustees with respect to exposure occurring prior to bankruptcy, "it would not provide adequate protection, in fact, it seems no protection from ongoing exposure."[25]

II. The Court of Appeal Decision

The Court of Appeal, by a two to one majority, dismissed the unions' appeal[26]. Essentially, the Court held that the unions had not met the necessary threshold for obtaining leave from the Court pursuant to section 215 of the BIA. The Court applied the test for leave set out in *Society of Composers, Authors & Music Publishers of Canada* v. *Armitage*[27] as well as *Mancini (Bankrupt) et. al. v. Falconi*[28]. Under that test there must

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[24] *Ibid.* at p. 158.
[25] *Ibid.*
[26] *Royal Crest Lifecare Group Inc.*, Re (2004), 46 C.B.R. (4th) 126 (Ont. C.A.) [hereinafter *Royal Crest Appeal Reasons*]. The Canadian Union of Public Employees and the Service Employees International Union have applied to the Supreme Court for leave to appeal this decision.
[27] (2000), 50 O.R. (3d) 688 (C.A.) [hereinafter *Socan*].

be sufficient evidence to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action. The majority upheld the finding by Justice Farley that it was premature for the union to bring its motion on the first day of bankruptcy of Royal Crest. The majority only held that, *at that time*, there was not a sufficient "factual underpinning" as required by the *Socan* and *Mancini* test to grant leave[29].

It is also important to note that the majority agreed with Justice Farley's characterization of the collective agreements in question as not being terminated by the bankruptcy of Royal Crest but rather being put into "suspended animation"[30]. This concept was later expanded upon by the Court of Appeal as described below.

Although Mr. Justice MacPherson, writing for the majority, explicitly found that Justice Farley did not decide if the Trustee was a successor employer to Royal Crest, Justice Borins in dissent indicates that Justice Farley came "perilously close" to doing so by following the decision of Mr. Justice Spence in *Re: 588871 Ontario Ltd.*[31]. In that case, the Court held that the question of successorship should be effectively decided by way of motion to the Bankruptcy Court under section 215 of the BIA, rather than by the OLRB. In that decision, Justice Spence held (and Justice Farley later agreed) that if a trustee in bankruptcy which carries on a bankrupt's business is exposed to liabilities as a successor employer, trustees might decline to carry on that business and that this decision could thwart the proper operation of the BIA. Justice Spence held that while the OLRB had exclusive jurisdiction to determine if a trustee in bankruptcy was a successor employer, the potential successor employer liabilities which could be imposed upon a trustee in bankruptcy by the OLRB were matters which could be considered by the Bankruptcy Court upon the section 215 motion for leave. The idea that the Bankruptcy Court could and should consider "bankruptcy principles" when considering a motion for leave under section 215 has now been considerably expanded by the Court of Appeal as described below.

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[28] (1993), 61 O.A.C. 332 (C.A.) [hereinafter *Mancini*].
[29] *Royal Crest Appeal Reasons*, supra at pp. 134-5.
[30] *Royal Crest Appeal Reasons*, supra at p. 136.
[31] (1995), 33 C.B.R. (3d) 28 (Ont. Gen. Div.).

THE *TCT LOGISTICS* DECISION

I. The Lower Court Decision

Pursuant to section 47 of the BIA, KPMG Inc. was appointed as interim receiver of T.C.T. Logistics Inc. and certain related companies ("TCT"). As set out above, the Order appointing KPMG Inc. contained the usual provisions that, even if the interim receiver retains TCT's former employees, such employment shall not constitute the interim receiver a "successor employer" within the meaning of the OLRA or any other statute. Following its appointment, the interim receiver continued to carry on the warehousing business operated by TCT from its Toronto premises and, for that purpose, engaged certain of the former employees of TCT to do so. 70 employees at the Toronto location were members of the Industrial Wood and Allied Workers of Canada, Local 700. KPMG Inc. later became trustee in bankruptcy of TCT as well after it filed an assignment in its capacity as interim receiver.

Several months after its appointment, the interim receiver entered into an agreement with Spectrum Supply Chain Solutions Inc. ("Spectrum") to sell substantially all the assets of the TCT warehousing business. Under the terms of the asset purchase agreement, Spectrum agreed to purchase certain of TCT's assets located at its leased premises in Alberta. Spectrum elected not to purchase the interim receiver's interest in TCT's leased premises in Toronto. The interim receiver retained Spectrum to wind-down the Toronto location. The asset purchase agreement between the interim receiver and Spectrum provided that the interim receiver would terminate all employees prior to the closing of that transaction and that Spectrum would re-hire only certain employees. Although Spectrum did not purchase the Toronto business from the interim receiver, it did hire certain of TCT's Toronto employees, without regard to union seniority. Spectrum later set up a warehousing business in Mississauga with essentially the same customers that TCT had at its former Toronto premises.

The union commenced an application before the OLRB seeking, among other things, a declaration that Spectrum was the successor employer to TCT and/or KPMG Inc. pursuant to section 69 of the OLRA as well as a declaration that TCT and Spectrum were

a single employer for the purposes of section 1(4) of the OLRA. The OLRB granted the interim receiver's motion that the OLRB proceeding be stayed since the union had not obtained leave of the Bankruptcy Court pursuant to section 215 of the BIA prior to commencing its OLRB proceeding. The union then brought a motion for leave to proceed before the OLRB under section 215 of the BIA.

Mr. Justice Ground adopted the reasoning of Justice Farley in *Royal Crest* that the determination of whether a trustee in bankruptcy or a receiver should be deemed to be a "successor employer" requires an analysis of the role the trustee or receiver is playing, that is, whether the trustee or receiver is acting as an employer or as a realizor in accordance with its BIA duties[32]. On the facts of this case, Justice Ground held that KPMG Inc., which had operated the warehousing business for less than four months and was actively engaged during that period in seeking a purchaser for the business, was acting as a realizor and not as an employer. The Order appointing the interim receiver was amended by Justice Ground to make clear that the interim receiver would not be considered a successor employer only if it engaged TCT's former employees and carried on TCT's business for the purpose of realizing upon TCT's assets through a going concern sale or otherwise for the purpose of effecting an orderly liquidation of TCT's assets.

Justice Ground declined to grant the union leave to proceed to the OLRB. Justice Ground's decision differs from that of Justice Farley in *Royal Crest* in that Justice Ground actually ordered that KPMG Inc. would not be considered to be a successor employer for the purposes of the OLRA provided that it was acting as a "realizor" and not as an "employer".

II. The Court of Appeal Decision

By a two to one majority, the Court of Appeal allowed the union's appeal of Justice Ground's decision to refuse the union leave to bring a successor employer proceeding

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[32] *TCT Logistics*, *supra* note 5 at p. 238.

before the OLRB.[33] The Court held that Justice Ground erred by applying the "realizor v. employer" test in denying the union's motion for leave since this resulted in Justice Ground effectively determining if the receiver was in fact a successor employer. The Court held that the Bankruptcy Court has no jurisdiction to make that determination[34]. The Court of Appeal elected to remit the matter back to the Bankruptcy Court Judge to determine if leave should be granted based on the expanded test for leave described in the reasons of the majority. That test departs from the test enunciated in *Socan* and *Mancini* to such an extent that Justice MacPherson, who wrote the decision of the majority in Royal Crest, dissents from the majority and rejects the expanded section 215 BIA test proposed by Justices Feldman and Cronk.

Madam Justice Feldman commences her analysis of the section 215 leave test by first examining the current state of the law relating to the effect of bankruptcy upon a collective agreement as well as the ability of the Bankruptcy Court to make a determination if a trustee in bankruptcy or interim receiver is, in fact, a successor employer within the meaning of the OLRA. That review may be summarized by the following principles.

A. The OLRB has exclusive jurisdiction to determine the successor employer issue

The Court held that subsections 69(12) and 114(1) of the OLRA give the OLRB unequivocal, exclusive jurisdiction to address the successor employer issue for labour relations purposes in every case. Subsection 47(2) of the BIA, pursuant to which the interim receiver in *TCT Logistics* was appointed, does not contain any language which directly authorizes the Court to deem that actions taken by the receiver will not make it a successor employer or not have any other effect mandated by applicable law.[35] In reaching this conclusion, the Court relies upon subsection 72(1) of the BIA which provides that the BIA shall not be deemed to abrogate or supercede the substantive provisions of any other law or statute relating to property and civil rights that are not in

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[33] Reasons for Judgment of the Ontario Court of Appeal in *GMAC Commercial Credit Corporation of Canada* v. *T.C.T. Warehousing Logistics Inc.* dated April 2, 2004 (Unreported) [hereinafter *TCT Appeal Reasons*].
[34] *Ibid.* at paras. 73-74.
[35] *Ibid.* at para. 28.

conflict with the BIA. The Court finds that since subsection 47(2) of the BIA does not conflict with the successor employer provisions of the OLRA, the BIA provision cannot supercede the provisions of the OLRA. The Court also relies upon subsection 14.06(1.2) of the BIA which provides that notwithstanding anything in any federal or provincial law, where a trustee or receiver carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed upon the debtor to pay an amount where the claim arose before or upon the trustee's or receiver's appointment. Based upon the provisions of subsections 14.06(1.2) and 47(2) of the BIA, the Court concludes that while the scheme of the BIA recognizes that a trustee or receiver may incur liabilities as a successor employer through operation of the debtor's business, but only for obligations incurred after the date of appointment, together these provisions are not sufficient to give the Bankruptcy Court authority to determine that an interim receiver operating the debtor's business will not be a successor employer under the OLRA.

B. Collective Agreements do not terminate on bankruptcy

Notwithstanding the previous statement by Justice Abella in the *St. Mary's* decision that collective agreements terminate upon bankruptcy, Justice Feldman interprets the statement to mean that collective agreements are not terminated for all purposes upon bankruptcy.[36] Rather, collective agreements may only be terminated in the manner set out in the OLRA[37]. The Court confirms that upon the sale of a business by an interim receiver or trustee in bankruptcy, the OLRB may declare that the purchaser is a successor employer and bound by the collective agreement that was in place between the debtor and the union[38].

The corollary to this statement is Justice MacPherson's statement in Royal Crest that, upon bankruptcy, a collective agreement goes into "suspended animation" until the relationship between the trustee and the employees is worked out. Justice Cronk, in her

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[36] *Ibid.* at para. 49.

[37] For example, by way of abandonment (OLRA section 63(17)), fraud (section 64(1)) or failure to bargain (section 65(2)).

[38] *TCT Appeal Reasons*, *supra* note 33 at para. 50.

concurring reasons, states that the core issue determined by the Court in *Royal Crest* was whether the Bankruptcy Judge had erred in denying leave under section 215 of the BIA having regard to the timing of the union's application on the first day of the bankruptcy[39]. Thus, by extension, the Court of Appeal has confirmed that even on the lower threshold enunciated in the *Socan* and *Mancini* decisions, there will not be a sufficient factual underpinning to a motion for leave to proceed to the OLRB for a successor employer declaration when the estate is still in its infancy and the scope and terms of employment of the debtor's former employees by the trustee have not yet been finalized or agreed to.

C. *Labour Relations Boards will find that receivers and trustees which operate the debtor's business will be considered successor employers*

Although Justice Feldman does not specifically state that a receiver or trustee in bankruptcy which carries on a debtor's business will be a successor employer, she does note that a number of labour board and Court decisions have made that finding[40]. This statement, when read in the context of the Court's earlier statements regarding the status of the collective agreement upon bankruptcy, suggests that the Court would not on appropriate facts disagree with an OLRB finding that a trustee in bankruptcy or a receiver was a successor employer in circumstances in which that party carried on the debtor's business. Notwithstanding Justice Feldman's statement, it should be noted that while there is abundant case law confirming that privately appointed and Court-appointed receivers will be considered successor employers for the purposes of labour relations legislation[41], there are no reported decisions which have held that the bankruptcy of a debtor results in the "sale" of the debtor's business to the trustee in bankruptcy within the meaning of the OLRA.

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[39] *Ibid.* at para. 140.

[40] *Ibid.* at paras. 45, 46 and 52.

[41] See, for example, *Maritime Life Assurance Co. v. Chateau Gardens (Hanover) Inc.* (1983), 43 O.R. (2d) 754 (Ont. H.C.J.) [hereinafter *Chateau Gardens*]; *H&S Reliance* [1998] O.L.R.B. Rep. Nov-Dec 935, [1998] O.L.R.D. 4087[hereinafter *H&S Reliance*]; *Deloitte & Touche*, *supra* note 8.

D. The expanded test for leave under Section 215 of the BIA

The scope of the test under section 215 of the BIA has been significantly expanded by the majority of the Court of Appeal. A new aspect to the section 215 test introduced by Justice Feldman is the effect that the proposed proceeding may have on the bankruptcy process itself and the Bankruptcy Court's essential control over that process[42]. Justice Feldman distinguishes the leave test in *Mancini* by noting that such test has previously been considered in the context of allegations of wrongdoing against the trustee. Even if leave is granted in those circumstances, the trustee will continue to carry out its duties, presumably with little effect from the proceeding against the trustee. Justice Feldman distinguishes that type of proposed proceeding from a successor employer proceeding before the OLRB, the outcome of which may affect the manner in which the trustee in bankruptcy or receiver manages the subject estate, specifically whether the trustee or receiver will operate the subject business as a going concern or shut down the business and liquidate the assets. Justice Feldman echoes the concerns of both Justice Ground and Justice Farley by indicating that the uncertainty surrounding the potential costs of becoming a successor employer may well affect the willingness of a receiver or trustee to act in that capacity[43]. Although Justice Feldman posits this expanded section 215 BIA test in the context of a successor employer application, she does indicate that these considerations may also be applied in any type of leave decision under section 215 of the BIA where they arise[44] and Justice Cronk specifically agrees with that assessment, notwithstanding Justice MacPherson's dissenting view that successor employer leave applications are being unfairly and improperly singled out under the expanded section 215 BIA leave test[45].

Justice Feldman indicates that the Court will consider the following factors on a section 215 motion[46]:

(i) the timing of the application;

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[42] *TCT Appeal Reasons, supra* note 33 at para. 53.
[43] *Ibid.* at paras. 54 and 56.
[44] *Ibid.* at para. 57.
[45] *Ibid.* at para. 116.
[46] *Ibid.* at paras. 58-9.

(ii) the complexity of the receivership and the demands on the receiver as it carries out its obligations;

(iii) the potential duration of the period that the receiver intends to operate the business before it can be sold (normally as brief as possible);

(iv) the availability of potential purchasers and their financial strength. This component of the test suggests that the trustee or receiver will be required to determine at a very early stage if the business is likely to be sold, specifically if any potential purchasers exist. It does not address the circumstance in which the marketing process for the business will take a significant period of time and ultimately no sale is concluded. It would seem that, based on the other factors enunciated by the Court, a leave application in those circumstances may succeed. It may also be deduced from this statement that a trustee or receiver which wishes to maximize the recovery to the estate by merely finishing work-in-process, without a view to selling the business as a going concern, will not be afforded the protections of the expanded leave test, unless the business is carried on for a very short period of time;

(v) the likelihood that a purchaser will be declared a successor employer and assume all of the obligations under the collective agreement. This aspect of the test suggests that a motion for leave is less likely to succeed if the trustee or receiver has already found a purchaser for the subject business which would result in the purchaser becoming a successor employer upon completion of that sale;

(vi) the practicality of proceeding before the OLRB on a successor employer application given the proposed duration of operation and timeliness of sale of the business. The Court appears to be indicating that the longer the trustee or receiver anticipates operating the business or that it actually operates the business, the more likely it will be that the Court will grant leave to proceed to the OLRB;

(vii) the immediate fairness to the employees, including any arrangements the receiver has made with the union to attempt to accommodate its requirements during the period before the business is sold. This suggests that the Court will be less likely to grant leave if the trustee or receiver reaches agreement with the subject union regarding the terms upon which the debtor's former employees will be engaged or, if no agreement can be reached, if the terms of the collective agreement are honoured.

In summary, Madam Justice Feldman states:

> In my view, it is both necessary and appropriate that the Bankruptcy Court use its power under section 215 to grant or deny leave to bring a receiver or trustee before the OLRB, to assist the receiver in achieving the best financial result for creditors and employees of the debtor, in most cases, by operating the business in order to sell it as a going concern.[47]

In much the same way as Justice Farley and Justice Ground and Justice Spence before them, the Court of Appeal has incorporated into the section 215 BIA leave test the broader considerations of the best administration of the estate in receivership or bankruptcy. Notwithstanding that the Court of Appeal has confirmed that the OLRB has exclusive jurisdiction to determine issues of successorship, the Court of Appeal will not provide the OLRB with the opportunity to do so if the balancing of interests test outlined above mitigates against such a finding.

E. The Scope of Appointment Orders has been narrowed

Justice Feldman has taken specific exception to the practice which has evolved in drafting appointment orders with respect to both receivers and trustees of exempting those parties from a variety of public interest statutes, curtailing the rights of third parties who have not been served with the application materials and limiting the potential liability of the receiver or trustee even in circumstances in which a federal or provincial statute addresses potential liability. Although the statement is obiter with respect to its

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[47] *Ibid.* at para. 60.

effect on matters not before the Court of Appeal in this case, her statement is worth reproducing since it will likely guide the drafting of appointment orders in the future:

> As pointed out in such cases as Big Sky and Royal Crest, and by the Bankruptcy Judge in this case, the practice of receivers attending on the Bankruptcy Judge *ex parte*, with a draft order that gives the receiver extensive powers, while at the same time cloaking it with immunity from responsibilities to parties who are not before the Court, can no longer be sanctioned[48].

F. The Court will assist in enforcing agreements between the trustee/receiver and the union

It is clear from the reasons of Justice Feldman that the Court's preferred resolution to a potential successor employer application is an agreement between the receiver or trustee and the relevant union regarding the manner in which the employment relationship will be managed while the business is operated. Justice Feldman confirms that if the parties reach an agreement, then that accommodation can be reflected in a Court order and, if an agreement cannot be reached, the Bankruptcy Judge will be "positioned to assist"[49]. This suggests that the Court may be prepared to make orders governing the terms upon which the unionized employees will be engaged by the receiver or trustee.

Presumably, in circumstances in which a trustee or receiver has reached agreement with the union, the Court will attempt to insulate the trustee or receiver from successor employer liabilities by denying leave to any party which later seeks leave to bring a proceeding against the receiver or trustee establishing such successor employer liabilities. If the Bankruptcy Court is unable to prevent the commencement of such proceedings against receivers or trustees through the BIA section 215 leave test, then any agreement between the receiver or trustee and the relative union cannot be enforced. As Justice Feldman notes, that was the result in *St. Mary's*[50]. However, since the Court has

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[48] *Ibid.* at para. 62.
[49] *Ibid.*
[50] *Ibid.* at para. 63.

confirmed that it has no jurisdiction to declare that a Court officer is not a successor employer, the only remedy available to the Court is to either prospectively order that it will not grant leave to any party to proceed to the OLRB on a successor employer application or to simply refuse to do so if such motion for leave is made. Obviously, the former course of action would be preferable to a receiver or trustee since it would provide certainty in advance of operating the subject business. Given the Court's comments regarding its reluctance to make wide ranging orders that may affect the rights of parties not represented or not served with the subject materials, as well as the jurisdiction of the Court to make such a prospective order, it seems unlikely that the Court would be prepared to do so. The unhappy result may be that a trustee or receiver enters into an agreement with a union, carries out its terms with the result that it clearly becomes a successor employer within the test set out by the OLRA (which is acknowledged by the Court of Appeal in its review of the relevant case law), only to find that a subsequent leave motion is granted. It is suggested that bringing certainty to the process would be an essential addition to the principles enunciated by Justice Feldman. This approach also does not address the situation in which the workplace is not unionized and there is no employee representative to reach agreement with and who may bind the work force.

G. The Constitutional Question

Although the Court of Appeal finds that the OLRB has exclusive jurisdiction to determine the successor employer issue, the Court confirms that under the expanded BIA s. 215 leave test, it is necessary for the Judge at first instance to determine if a *prima facie* case may be made out on the facts at hand that the trustee or receiver would be a successor employer. To assist in that determination, the Court advises that the Bankruptcy Judge should consider the factors applied by the OLRB as well as those set out by Justice MacLaghlin in *W.W. Lester*. If the Bankruptcy Judge concludes that such a *prima facie* case may be made out and that it is in the best interests of the estate utilizing the bankruptcy principles referred to above that leave to proceed to the OLRB not be granted, then the Bankruptcy Judge's decision to deny leave to proceed to the OLRB would conflict with section 69 of the OLRA. The Court of Appeal finds that when this

occurs, subsection 72(1) of the BIA is engaged, with the result that subsection 69(12) of the OLRA is superceded by section 215 of the BIA.

The constitutional approach taken by the Court of Appeal is certain to raise concerns. The Supreme Court has recently held that explicit statutory language is required to divest persons of rights they otherwise enjoy at law. Provided the doctrine of paramouncy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights.[51]

It may also be argued that there is no operational conflict between the provisions of the OLRA and the BIA since section 215 of the BIA only contemplates that no action be taken against an interim receiver or a trustee without leave of the Court. However, since section 215 of the BIA contemplates that leave of the Bankruptcy Court will be required, it is only a matter of the test which the Bankruptcy Court applies in considering a motion for leave. Thus, although there may not appear to be a conflict between section 215 of the BIA and the OLRA based upon the earlier leave test set out in *Mancini* and *Socan*, it is really just a question of the threshold test utilized by the Bankruptcy Court in determining if leave should be granted. Therefore, depending upon the leave test utilized, a conflict may exist between section 215 of the BIA and, in this case, the OLRA.

It is important to note, as well, that since the Court of Appeal's analysis is predicated upon section 215 of the BIA superceding section 69 of the OLRA, the same result would presumably not be achieved in the context of a receiver/manager appointed pursuant to section 101 of the Ontario *Courts of Justice Act*, a provincial statute.

H. The Effect of BIA s. 14.06(1.2)

Justice Feldman states that s. 14.06(1.2) of the BIA protects a trustee or receiver that operates the business of a debtor and has become an employer from responsibility from

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[51] *Crystalline Investments Ltd. v. Domgroup Ltd.* [2004], S.C.J. 3 at p 11. See also *St. Mary's supra* note 19 at p. 176, in which the Court of Appeal stated that the doctrine of paramouncy has no application unless there is an otherwise unavoidable conflict between the federal and the provincial statute. The Court noted that the doctrine of paramouncy 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.

making good the defaults of the debtor. Justice Feldman notes that the section is silent on any obligations that the trustee or receiver may incur on a go forward basis, including as a possible successor employer under the OLRA[52].

It would seem that a more clear conflict exists between BIA s. 14.06(1.2) and section 69 of the OLRA since, if a successor employer declaration is made by the OLRB, it results in the trustee or receiver becoming the employer for all purposes. As noted above, a trustee or receiver which becomes a successor employer for the purposes of the OLRA may by extension inherit pre-appointment liabilities of the debtor under the subject collective agreement. If the OLRB is not competent to apportion liability as between the insolvent debtor and the trustee or receiver as successor employer, but only to make a declaration that the trustee or receiver is a successor employer, then it would seem clear that a conflict would exist between s. 14.06(1.2) of the BIA and the OLRA. Presumably, similar conflicts would exist between this provision of the BIA and other employment statutes which have the effect of imposing liabilities of the debtor upon a trustee or receiver as a successor employer[53].

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52 *TCT Appeal Reasons*, supra note 33 at paras. 32-33.

53 Since the mandate of the OLRB is to determine if a "sale" of the business has taken place, it does not appear that the OLRB has jurisdiction to make a finding that a trustee in bankruptcy or receiver would be liable as a successor employer for only post-bankruptcy claims. See *Re Deloitte & Touche*, *supra* note 8 at para. 41 in which the Court held, "...the Board's function under the successorship provisions is to make a declaration of legal rights, and not to make the findings of liability consequent upon those rights" as well as *Crown Zellerbach*, *supra* note 20 at p. 6 in which the BCLRB stated that the equivalent of s. 69 of the OLRA "does not empower the Board to make determinations of obligations and liabilities as between the vendor and the purchaser". However, in *H&S Reliance, supra* note 41, the OLRB declared that the receiver and manager in that case was a successor employer to the debtor for only a limited period of time. It is not clear, however, that a finding of successorship for a limited period of time will actually limit the receiver's or trustee's liabilities to those which accrue only during the period of time in which the receiver or trustee is considered a successor employer. For example, in *Chateau Gardens, supra* note 41, a Court-appointed receiver found to be a successor employer was held liable for payment of wage increases for employees retroactive to a time before the appointment of the receiver. It should also be noted that since the Court of Appeal in *TCT Logistics* has held that the Bankruptcy Court does not have jurisdiction to make a finding of successorship, it follows that the Bankruptcy Court does not have jurisdiction to control determinations by the OLRB or to limit the exercise of the OLRB's jurisdiction regarding the liabilities to which a trustee or receiver would be exposed if it is declared by the OLRB to be a successor employer. It seems unlikely based on the Court of Appeal's reasoning that the Bankruptcy Court judge could direct the OLRB to limit any finding of successorship liabilities to only the period from and after the trustee's or receiver's appointment.

It appears that the actual conflict perceived by the Court of Appeal is that a finding of successorship by the OLRB may discourage a trustee or receiver from operating a business and thereby maximizing the return to the stakeholders:

> If the receiver can show that by operating the business for a short time it can maximize the value of the business for the benefit of creditors and, at the same time, thereby save as many jobs as possible, it will make sense for the Court to deny leave, particularly where the OLRB will, if appropriate, determine that the purchaser is a successor employer, obliged to carry out the collective agreement. In that way, the union and employees are protected and the receiver can make its decision whether to operate the business knowing the extent of its obligations.[54]

What is left unanswered by the Court of Appeal is precisely to what extent the foregoing bankruptcy principle will conflict with various provincial laws governing property and civil rights. Although it does not address the issue, it seems unlikely that the Court of Appeal is suggesting that a trustee or receiver may simply cherry-pick those provincial statutes regarding property and civil rights it will comply with under the guise of conflict with its statutory mandate under the BIA. Rather, the Court of Appeal is suggesting that under the section 215 BIA leave test, a balancing of interests must be conducted by the Court such that a conflict will only exist if the applicable provincial law affecting property and civil rights clearly undermines the trustee's or receiver's paramount duty under the BIA to achieve the highest possible realization for stakeholders, including the employees, by imposing upon the trustee or receiver certain of the debtor's pre-appointment liabilities.

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[54] *TCT Appeal Reasons*, *supra* note 33 at para. 61.

CONCLUSION

The Court of Appeal has now provided some guidance to permit the stakeholders in an insolvency proceeding to determine if a receiver or trustee will be considered a successor employer if it operates the debtor's business. As noted above, since the Court of Appeal has made it clear that the Bankruptcy Court may not make a declaration that a trustee or receiver is not a successor employer, it is only through the expanded BIA section 215 leave test that the Bankruptcy Court will be positioned to insulate a trustee or receiver from certain successor employer liabilities arising under the OLRA. The expanded BIA section 215 leave test does not provide certainty to trustees or receivers since it does not appear that the Court may prospectively order that leave will never be granted to a party seeking a declaration that the trustee or receiver is a successor employer.

In those circumstances in which the potential successor employer liabilities are prohibitive, it may be appropriate to permit the insolvent debtor to remain in possession of its assets and restructure its affairs through rehabilitative legislation such as the *Companies' Creditors Arrangement Act* (Canada). Alternatively, carefully limiting the scope of an interim receiver's appointment such that it only monitors receipts and disbursements, rather than taking possession of the debtor's assets and operating its business, will also limit these liabilities.

However, if it is necessary for a trustee or receiver to take possession of the debtor's assets and operate the debtor's business to enable a going concern sale, certain steps may be taken to insulate the trustee or receiver from successor employer liabilities. Consideration should be given to obtaining an order of the Court which states that the trustee or receiver shall engage the debtor's employees "in the name of and on behalf of the debtor", or, alternatively, confirming that the employees' employment by the debtor has not been terminated in the case of a receivership[55]. If possible, an indemnity should be obtained from the purchaser for any successor employer liabilities to which the trustee or receiver is exposed following closing of a sale of the business. The disadvantage to this approach is that the purchaser will likely require an abatement of the purchase price

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[55] Bankruptcy terminates the employment relationship. See *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27.

in an amount equal to the potential successor employer liabilities of the vendor. This results in a reduction of the purchase price in circumstances in which such successor employer liabilities remain contingent. The success of this approach is also dependent upon the value of the purchaser's covenant.

Alternatively, prior to operating the business the receiver or trustee may seek a release and indemnity from the union and relevant employees with respect to all successor employer liabilities. Although this provides a level of protection against actions commenced by either the union or the employees, it does not prevent other entities who are not parties to that agreement, such as a pension administrator appointed under the PBA or the Director of Employment Standards, from pursuing the trustee or receiver for successor employer liabilities even after a sale of the business has closed. There may also be a question as to the receiver's or trustee's ability to set-off amounts claimed by a third party against amounts owed by the union under any such indemnity.

It may also be possible to bar or even extinguish any successor employer liabilities which have accrued during the administration of the estate in receivership or bankruptcy upon the discharge of the trustee or receiver. Pursuant to subsection 41(8) of the BIA, the discharge of a trustee discharges him from all liability in respect of any act done or default made by him in the administration of the property of the bankrupt and in relation to his conduct as trustee provided, however, that any discharge may be revoked by the Court on proof that it was obtained by fraud or by suppression or concealment of any material fact. Notice would have to be given to the subject union and to other employee or governmental representatives, such as the Director of Employment Standards.

Although no corresponding provision exists in the BIA with respect to the discharge of an interim receiver, it is common to obtain a bar claims order upon the motion for discharge of an interim receiver. Again, notice would be required to be given to the relevant unions as well as any affected governmental representatives. If, utilizing the expanded BIA s. 215 leave test set out by Justice Feldman, the Court would not be inclined to grant leave to a party seeking to have the trustee or receiver declared a successor employer, then such result would mitigate in favour of the Court ordering that such successor employer

liabilities be extinguished, or at the very least barred, upon the trustee's or interim receiver's discharge.

Absent any further amendments to the relevant legislation[56], there will be continuing uncertainty regarding the scope of successor employer liabilities in those circumstances in which a trustee or receiver operates the debtor's business.

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[56] In the report of the Standing Senate Committee on Banking, Trade and Commerce dated November, 2003 the Committee discusses the potential personal liability of trustees, receivers and other insolvency practitioners as successor employers. The Committee's view is that if competent individuals are to become insolvency practitioners, they must be provided with some measure of protection from personal liability in their role as administrator and not be assimilated to, or treated as, successor employers. The Committee recommends that the BIA be amended to separate clearly the personal liability of an insolvency practitioner from the liability of the debtor's estate.