Real Time Insolvency Litigation, *TCT Logistics Inc.*, and the Need for Certainty

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In January of 2002, TCT Logistics Inc. and its related companies (collectively "TCT") became insolvent and, as can be expected, diverse parties raced to protect their interests. TCT's principal lender went to bankruptcy court to seek the appointment of an interim receiver. The interim receiver operated TCT's business and was able to conclude several court-approved going concern sales of operating units. Late in the receivership process, a union representing a small group of TCT's employees sought to commence proceedings before a provincial labour board to have the interim receiver declared to be a successor employer. Such a declaration would have saddled the interim receiver with unexpected liabilities that could have thrown into doubt the whole rationale of TCT's receivership process. Ultimately, the bankruptcy court denied the union leave to proceed.[1] The union appealed the decision, giving the Court of Appeal for Ontario an opportunity to walk the difficult legal tightrope of a bankruptcy proceeding's pressing time constraints, personal and financial catastrophes, and conflicting legal jurisdictions.[2] With an appeal of the Court of Appeal's decision pending before the Supreme Court of Canada, an authoritative determination of these issues is expected in 2006.

In previous cases, the Supreme Court of Canada has reiterated Parliament's determination to vest control of the bankruptcy process in one court[3] and to create one national bankruptcy regime spanning the entire country.[4] Since at least 1992, this single bankruptcy regime has focused upon achieving going concern sales instead of liquidations.[5] The benefits of a going concern sale are numerous. Creditors receive a higher return because the sale of a functioning business is more valuable than liquidated assets. If the operating business is sold, the customers maintain their source of supply; suppliers retain their customer and have a chance to defray losses with future profit; most significantly, employees keep their jobs. Employees are particularly vulnerable in a business failure.[6] If they lose their jobs, they have preferred

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[1] *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.* (2003), 42 C.B.R. (4th) 221, [2003] O.T.C. 365 (Ont. Sup. Ct.), rev'd (2004), 71 O.R. (3d) 54, 48 C.B.R. (4th) 256 (Ont. C.A.) [*TCT Initial Decision*].

[2] *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.* (2004), 71 O.R. (3d) 54, 48 C.B.R. (4th) 256 (Ont. C.A.), rev'g (2003), 42 C.B.R. (4th) 221, [2003] O.T.C. 365 (Ont. Sup. Ct.) [*TCT Appeal Decision*].

[3] *Sam Lévy & Associés v. Azco Mining Inc.*, [2001] 3 S.C.R. 978 [*Sam Levy*].

[4] *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 [*Husky Oil*].

[5] For a general introduction to the 1992 amendments to the *Bankruptcy Act* (which was then renamed the *Bankruptcy and Insolvency Act*) and how they facilitated receiverships and going concern sales, see Frank Bennett, ed., *Bennett on Receiverships*, 2d ed. (Toronto: Carswell, 1999) at 671-673.

[6] *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at paras. 91-95.

protection for back wages and, in some cases, vacation pay. But their claims for pay in lieu of statutory notice, severance pay and common law notice rank as general unsecured claims sharing with all other general creditors. In the non-unionized sector, individual employees have little power to influence the insolvency process. Even in the organized sector, unions rarely become involved. Typically, unions become involved only after the business is sold and a new, successor employer has taken over the business.

A successor employer takes on all of the obligations of the prior employer. For solvent companies this provides an important protection to employees and unions by ensuring that employers do not seek to devise structures simply to escape their collective bargaining obligations. In an insolvency, unions typically wait for a sale of the insolvent business and seek to take up their negotiations with the buyer right where they had left off with the former employer. But, in order to sell the insolvent business, a court officer, such as a receiver, an interim receiver or a trustee in bankruptcy is often required to operate the business for a brief period to stabilize the situation and to market and sell the business. This paper examines the risks associated with applying successor employer concepts to the court officer. In particular, we consider how the Court of Appeal's decision has attempted to reinvigorate collective bargaining at the outset of the insolvency process in order to promote certainty and limit disincentives to going concern sales. While the Court of Appeal has clearly recognized in principle the primacy of insolvency law and the desirability of limiting successor applications that impair going concern realizations, the ability to achieve sufficient certainty through early and effective collective agreements between court officers and unions remains to be seen.

During the disaster that is a commercial bankruptcy,[7] the interests of creditors, employees, and the myriad of stakeholders are often in conflict. The courts have two distinct opportunities to balance these competing interests. The court's first opportunity occurs during the real time insolvency process when the decisions of the court appointed receiver or the trustee in bankruptcy must be approved by a judge. The Honourable Mr. Justice James M. Farley of the Ontario Superior Court of Justice has described the real time litigation phase as litigation that "must be dealt with urgently and upon critical paths dictated by the prospect of values flying out the window if there is any delay."[8] These decisions will form the basis for future conduct of the parties. Critical decisions about the future of a business must be made with limited information and under severe time constraints. To address these limitations, the bankruptcy court convenes regularly to approve important decisions and concerned parties can appear and defend their interests. In a real time scenario, the bankruptcy court's earlier decisions form the factual underpinnings of future decisions.[9] The aftermath of TCT's insolvency is an example of the competing pressures of a real time process. Consequently, the first section of this paper will chronicle the history of TCT's insolvency and describe the Ontario Superior Court of Justice's

[7] *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126 at para. 21, 181 O.A.C. 115 (Ont. C.A.), aff'g (2003), 40 C.B.R. (4th) 146 (Ont. Sup. Ct.).

[8] Hon. Justice J.M. Farley, "The International Scene: A Judicial Perspective on International Cooperation in Insolvency Cases" (1998) 17(2) American Bankruptcy Institute Journal 12 (Lexis).

[9] The notion of real time litigation is also understood in American bankruptcy law. See, *In re: USA Capital, LLC*, 251 B.R. 883 at 888 (Bankr. D. Colo.) (Lexis).

decision concerning TCT's insolvency [the "*TCT Initial Decision*"].[10] This section examines the need for certainty to allow the creditors and the interim receiver to make the decisions required to operate the business toward a going concern sale and highlights the ongoing involvement of the bankruptcy court as an important means by which certainty is achieved.

The court's second opportunity to balance the interests of all the parties to an insolvency arises when appellate courts interpret the legislation governing the bankruptcy process. Appellate proceedings rarely unfold in real time and are often decided within the framework of normal "autopsy" litigation in which the judges review the *res gestae* and apply the law to the static body of facts.[11] Appellate courts must grapple with the ambiguities of insolvency law and the competing policy considerations that are employed to resolve them. With this in mind, the second part of this paper will focus upon the Court of Appeal's decision (the "*TCT Appeal Decision*").[12] This section will introduce several potential sources of certainty including the immunity offered by subsection 14.06(1.2) of the *Bankruptcy and Insolvency Act,* (the "BIA"), the requirement for leave to take proceedings against a receiver or trustee in section 215 of the BIA and the re-emergence of collective bargaining possibilities in insolvency proceedings.

The reason for highlighting this distinction between real time and autopsy litigation at the outset of this paper is to stress that when courts are deciding autopsy litigation cases, they must attempt to formulate judgments that make sense and can be applied during the real time processes under which ensuing cases will unfold. An essential element of real time bankruptcy and insolvency litigation is certainty. As going concern realizations have become the favoured model for insolvencies, bankruptcy courts have increasingly confronted the real time demands of operating businesses. Parties often differ on the potential effects of a proposed step towards realization. Motions are brought throughout the case under urgent time constraints while events are evolving, positions are changing, and the stability of the debtor is eroding. The bankrupt court is called upon to make determinations that will subsequently be relied upon as the basis for future steps. Money is invested, jobs are saved or lost, assets are operated or liquidated, all based upon real time decisions of the bankruptcy court. If those decisions are open to be re-visited at a later date, unfairness can result. Essentially, receivers, lenders and all stakeholders in an insolvency require certainty. Accordingly, discussions of how to achieve certainty and the consequences of uncertainty, permeate this paper.

Without doubt, creditors lend into an insolvency and forbear from liquidation in order to allow going concern operations leading to going concern sales for the selfish reason of maximizing recovery. The fact that successful going concern sales also protect suppliers, customers, employees and the public, makes going concern sales a win-win scenario that the government and the courts encourage. But it is inappropriate to expect creditors to invest and allow secured collateral to be consumed by ongoing, and typically losing, operation of the business if, later, other parties can change the legal order and deprive the creditors of the promised fruits of their investment. But the crucial decision to operate must be made at the

[10] *TCT Initial Decision*, *supra*, note 1.

[11] Hon. Justice J.M. Farley, "The International Scene: A Judicial Perspective on International Cooperation in Insolvency Cases" (1998) 17(2) American Bankruptcy Institute Journal 12 (Lexis).

[12] *TCT Appeal Decision*, *supra*, note 2.

earliest point in the process in order to keep the business open and to avoid the loss of employees, customers, suppliers and goodwill that even a temporary shutdown will cause. Even with the limited information available at the outset when the business is in crisis, creditors must seek certainty on two fronts: certainty that a going concern sale will likely yield more proceeds than a liquidation; and the certainty that operating the business will not create or re-order additional, unforeseen liabilities that exceed the benefits of the going concern sale. Without the certainty of obtaining the proceeds of realization, creditors will liquidate instead of investing fresh money in a losing enterprise.

Requiring bankruptcy court approval for every significant decision in a real time process promotes certainty. If court-approved conduct can later be questioned, the risk of operating the business will be too high and liquidations will result. This is not an *in terrorem* argument. The experience after *Re St. Marys Paper Inc.* ["*St. Marys*"], discussed below, is a very real example of the risk of liability preventing socially desirable conduct in insolvency proceedings.[13] The *TCT Appeal Decision* highlighted the tension between the goals of creating certainty within a legal system focussed on fairness and efficiency. Feldman J.A. in her reasons advocated a negotiated solution between unions and receivers to address these difficulties.[14] Failing a consensual outcome, she argued that the bankruptcy judge will be positioned to help the parties obtain both certainty and fairness.[15] Therefore, the third section of this paper contains a discussion of methods to foster certainty and encourage going concern sales in bankruptcy and insolvency law. While questions remain as to the feasibility of timely negotiations with unions during the crisis period at the outset of an insolvency proceeding, with a purposive reading of subsection 14.06(1.2) of the BIA and the Court of Appeal's recognition of the key goal of promoting certainty so as to favour going concern sales, a path towards a more stable and doctrinally acceptable future can emerge.

Part 1 – The Insolvency of TCT and the Real-Time Litigation Process

TCT operated a major supply chain management business, which focused primarily upon trucking, high-tech, freight brokerage and warehousing businesses.[16] Its integrated transportation, warehousing and logistics operations utilized over 31 million square feet of warehousing space, and over 400 trucks and 2,000 trailers either leased or owned by the company. Among TCT's stakeholders were its 1,357 employees who worked throughout North America and were represented by 13 distinct unions.[17]

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[13] *Re St. Marys Paper Inc.* (1994) 19 O.R. (3d) 163 (Ont. C.A.), rev'g (1993), 15 O.R. (3d) 359 (Ont. Ct. Gen. Div.) [*St. Marys*].

[14] *TCT Appeal Decision*, *supra*, note 2, at para. 62.

[15] *Ibid*, at para. 62.

[16] *Ibid,* at para. 2.

[17] *TCT Initial Decision*, *supra*, at note 1, at para. 2.

The collapse of TCT was particularly disastrous because of the circumstances that preceded its insolvency. TCT's largest secured creditor, GMAC Commercial Credit Corporation – Canada ("GMAC"), uncovered accounting irregularities by which TCT had drawn approximately $21 million over and above its contractual borrowing limit. The discovery of this allegedly fraudulent attempt by TCT to deceive GMAC prompted the senior management of TCT to resign. As word quickly spread of the problems at TCT, the stakeholders in TCT's various businesses began to exercise self-help remedies in order to secure their precarious positions. TCT's trucking customers began hiring other companies to transport their goods. TCT's truckers seized customers' goods in transit. TCT's security guards threatened to leave warehouses containing literally hundreds of millions of dollars of goods unattended unless their outstanding fees were paid. Without any cash available to it, TCT suddenly began to fall apart.

Creditors commonly use interim receivers during insolvencies to maximize their recovery. This is because subsection 47(2) of the *Bankruptcy and Insolvency Act* ("BIA")[18] affords interim receivers a wide range of powers to manage a debtor's business.[19] Interim receivers are court-appointed and are officers of the court.[20] Thus, all of an interim receiver's powers derive from, and their actions are subject to the approval of, the bankruptcy court.[21] Consequently, they must exercise their powers not just in the interests of creditors but for the benefit of all of the debtor's stakeholders.[22] The bankruptcy courts have recognized that subsection 47(2) allows an interim receiver the latitude to react to the practical realities of a commercial bankruptcy, especially given the unpredictability of the exigent circumstances. Farley J. described the situation as follows in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.*:

> While the BIA is generally a very fleshed-out piece of legislation when one compares it to the CCAA, it should be observed that s. 47(2)(c): "The court may direct an interim receiver…to…(c) take such other action as the court considers advisable" is not in itself a detailed code. It would appear to me that Parliament did not take away any inherent jurisdiction from the court but in fact provided, with these general words, that the court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.[23]

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[18] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 47(2) [BIA].

[19] Steven J. Weisz and James A. Skinner, "The Use of Interim Receivers in Corporate Restructurings and Reorganizations" (2000) 12(4) Commercial Insolvency Reporter 57 at 58-59.

[20] *Bennett on Receiverships*, *supra,* note 5, at page 24.

[21] Steven J. Weisz and James A. Skinner, "The Use of Interim Receivers in Corporate Restructurings and Reorganizations" (2000) 12(4) Commercial Insolvency Reporter 57 at 59.

[22] *Bennett on Receiverships*, *supra,* note 5, at page 25.

[23] *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 at 185 (Ont. Ct. Gen. Div.) (QL).

In order to safeguard its substantial investment in TCT, GMAC moved under section 47 of the BIA and section 101 of the *Courts of Justice Act*[24] for an order appointing KPMG Inc. as TCT's interim receiver under the former statute and as a receiver and manager under the latter (collectively, the "Interim Receiver").[25] The Honourable Mr. Justice John D. Ground of the Ontario Superior Court of Justice granted the order on January 24, 2002 (the "Receivership Order").[26] This Receivership Order provided the Interim Receiver with a wide range of powers including the abilities, subject to court approval, to sell TCT's businesses and to assign TCT into bankruptcy.[27] Specifically, paragraph 15 of the Receivership Order immediately terminated the employment of TCT's entire workforce, while subparagraph 3(h) allowed the Interim Receiver to "engage, retain and to discharge or terminate such agents, assistants and employees of any of [TCT's businesses]."[28] Paragraph 8 of the Receivership Order, based on section 215 of the BIA, required anyone wishing to sue or commence proceeding against the Interim Receiver to first obtain leave of the bankruptcy court.[29]

Both paragraph 15 and subparagraph 3(h) of the Receivership Order expressly provided that the Interim Receiver would not be declared a successor employer. As defined in Ontario's *Labour Relations Act* ("LRA"),[30] someone who acquires a business by sale or transfer from an employer is a "successor employer" and is bound by any existing collective agreements until the Ontario Labour Relations Board ("OLRB") rules otherwise. Subject to subsection 14.06(1.2) of the BIA, which is discussed below, a successor employer becomes bound by the former employer's obligations to its employees. Because the expenses incurred by a receiver attract super-priority, they rank above the claims of all other creditors.[31] Normally, as noted above, employee related claims are unsecured and rank below the secured claims of lenders. Upon a bankruptcy, if secured lenders have claims that are greater than the total amount of the assets

[24] *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 101.

[25] *TCT Appeal Decision*, *supra*, note 2, at para. 3.

[26] *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.* (24 January 2002), Toronto 02-CL-4387 (Ont. Sup. Ct.) [Receivership Order].

[27] *TCT Appeal Decision*, *supra*, note 2, at para. 3.

[28] *Ibid*.

[29] *Ibid,* at paras. 4-6. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 215: "Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act."

[30] *Labour Relations Act (1995)*, S.O. 1995, c. 1, s. 69(2) [LRA].

[31] Receiver's and trustee's expenses are protected in several ways. Typically the order appointing a receiver will contain a court-ordered change over the debtor's assets to indemnify the receiver for all of its expenses. This change will rank ahead of the claims of all other creditors. An interim receiver under the BIA may also be so protected although subsection 47.2 of the BIA precludes a charge of disbursements occurred in the operation of the debtor's business. This gap is usually filled either by combining an interim receivership under the BIA with a receivership under a provincial statute such as Ontario's *Courts of Justice Act* (*supra*, note 24) and taking a court-ordered charge in that capacity or often the interim receiver will seek a contractual indemnity from the lead secured creditor. In bankruptcy, while the trustee's expenses rank behind claims of secured creditors, by section 136(1)(b)(ii) of the BIA, administrative claims against the trustee are paid in full before preferred or general unsecured claims are paid.

available, unsecured claims will be left unpaid. But when a receiver is declared a successor employer, many of these unsecured employee claims then attach to the receiver and attract super-priority.[32] In addition, receivers are particularly wary of being declared successor employers because of the possibility of their own personal liability for paying employee claims.[33] It is difficult to expect secured lenders to support the operation of the business if, by doing so, unsecured claims will become priority claims ranking ahead of the claims of the secured lenders. One can argue, theoretically, that if the gain from a going concern sale exceeds the amount of the losses incurred by operating the business and the elevated employee claims, then lenders will continue to opt for such sales. But this assumes that there is a high degree of predictability on the first day of the receivership of the existing cash flow utilization of the debtor, its accrued employee liabilities and the likely proceeds on a receiver's sale. In fact, each of these factors is far from certain and the least certain is the question of employee liabilities. As discussed below in greater detail, pension deficits in particular can change by large amounts even if the debtor has made all required contributions to the pension plan. As a result of the uncertainty associated with the potential outcome, lenders will not allow a receiver to employ employees and incur business losses if, by doing so, it would subordinate lenders' secured claims.[34] Moreover, trustees and receivers will not act because of the potential for massive personal liability in a no asset scenario.[35] The Senate Committee explicitly recognized this factor in its 2003 review of the BIA.[36]

In light of these elevated risks of liability, receivers can be expected to refuse to operate businesses if they face the risk of being declared successor employers. This will jeopardize the possibility of going concern sales and is therefore contrary to the goals of the BIA.[37] To prevent receivers from incurring successor liabilities under collective agreements, receivership orders have typically included clauses to insulate receivers from being declared successor employers.[38]

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[32] Examples of these unsecured charges could include indeterminate pension liabilities, and unpaid termination, severance and common law notice pay.

[33] For a discussion of a receiver's personal liability, *Bennett on Receiverships*, *supra*, note 5, at page 12.

[34] See *Husky Oil, supra*, note 4, at paras. 32-35.

[35] *588871 Ontario Ltd., Re*, (1995), 33 C.B.R. (3d) 28 at para. 18 (Ont. Ct. Gen. Div.).]

[36] Canada, Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Standing Senate Committee on Banking, Trade and Commerce, 2003) at 129 (Chair: Richard H. Kroft): "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. In essence, their protection must exceed the risk they assume in providing services, otherwise they are unlikely to do so."

[37] *588871 Ontario Ltd., supra,* note 35, at para. 18: "If, in circumstances such as those in the present case, a trustee in bankruptcy who is given authority to carry on the business is to be exposed to the risk of being considered a successor employer and the attendant liabilities of the status, no trustee would ever undertake to carry on that business and that could thwart the proper operation of the BIA. I think this concern may properly be taken into account."

[38] *TCT Appeal Decision*, *supra*, note 2, at para. 24.

The effect of such clauses is central to the court cases surrounding TCT's bankruptcy and to the future course of going concern sales in insolvency proceedings in Canada.

In TCT, the Interim Receiver faced an urgent situation of crisis when it was appointed in January 2002. Accordingly, it used its court-granted authority to stabilize the rapidly deteriorating situation. The Interim Receiver did not trust the integrity of TCT's financial systems and had to run the businesses and conduct negotiations without reliable financial information. The Interim Receiver had to decide which of TCT's many businesses had to be shut down and which could be operated and sold as going concerns. These decisions involved attempts to maximize the return to creditors and to minimize the adverse affects of shutdowns upon employees, customer and suppliers. Within one week of its appointment, the Interim Receiver had commenced discussions with 75 prospective buyers for the different TCT operations. This bore fruit immediately with the sale of the freight brokerage business that was negotiated within the first week of the receivership and was subsequently approved by the bankruptcy court on February 8, 2002. Several other business units and assets were sold on an ongoing basis thereafter. All this was taking place while the Interim Receiver attempted to retain TCT's customers and prevent independent, self-help actions by TCT's various stakeholders.

On February 22, 2002, the Interim Receiver assigned TCT into bankruptcy and immediately faced an additional constraint. Under Ontario's *Commercial Tenancies Act*[39] and the BIA, the Interim Receiver could only occupy TCT's leased premises for three months before either affirming the leases or disclaiming them and leaving the premises. Along with its other operations, this affected TCT's warehousing business and four of its leased warehouses. These warehouses, three located in Alberta and one at Horner Avenue in Toronto, Ontario, employed a total of 225 employees. Of these employees, 78 were unionized and governed by four separate collective bargaining agreements.

The unionized employees at the Horner Avenue warehouse in Toronto were governed by one of these collective bargaining agreements and the Industrial Wood and Allied Workers of Canada, Local 700 (the "Union") was their exclusive bargaining agent. TCT and the Union had entered into a collective agreement with respect to this warehouse, to run from May 1, 2000 to April 30, 2004.

The litigation that the Union eventually initiated would determine the Interim Receiver's responsibilities once it began operating the Horner Avenue warehouse. During the period of the receivership, the Interim Receiver paid the wages, vacation pay, and other benefits that the employees earned during this time.[40] The Interim Receiver never adopted TCT's collective agreements and therefore it did not pay union dues and pension contributions. At issue, was the Interim Receiver's liability for any unsatisfied employee benefits that accrued under the collective agreement before its appointment upon TCT's insolvency. The Union would claim that the Interim Receiver was acting just like any other new employer and was bound by collective agreements as a successor employer. The Interim Receiver would maintain it was

[39] *Commercial Tenancies Act*, R.S.O. 1990, c. L-7.

[40] *Bennett on Receiverships*, *supra, note 5,* at 376.

acting on an interim basis to sell the warehousing business as a going concern and was therefore acting to realize upon assets and not as a successor employer.

The Receivership Order appointing the Interim Receiver was obtained without notice to the Union. However, upon its appointment, the Interim Receiver sent a memorandum to the employees of TCT that explained its appointment and its intention to operate the business in order to evaluate potential sales of the various businesses. The memo contained no references to the adoption of any collective agreements. In a letter to the Interim Receiver dated February 1, 2002, the Union advised the Interim Receiver that it intended to maintain its collective bargaining rights under the LRA.[41] The Union did not take any steps to vary or amend the terms of the Receivership Order. Nor did it put itself on the service list in the Court proceeding. People who wish to be served and to participate simply need to deliver a one-line notice, or often just make a telephone call to the receiver's counsel in order to be added to the service list. Had the Union indicated its interest as did many other stakeholders, it would have been added to the service list and been able to participate in, and seek relief through, the myriad of ongoing bankruptcy court proceedings that unfolded almost weekly in real time throughout February, March, April and May 2002. These proceedings therefore continued without the participation of the Union at its choice.

Eleven parties expressed interest in purchasing TCT's warehousing business and five parties made offers. On March 7, 2002, the Interim Receiver entered into a letter of intent with 1377008 Ontario Limited. This offer would have maintained all employment at the warehouses, provided the highest price and imposed the least onerous conditions. The letter of intent expressly included the assumption of the lease of the Toronto warehouse premises on Horner Avenue and maintained the business and all employment at that location. After conducting further due diligence examinations, however, 1377008 Ontario Limited told the Interim Receiver that it had become dissatisfied with the Horner Avenue premises in Toronto. It raised issues concerning the onerous terms of TCT's lease, the high operating costs and taxes at the site, the building layout, age and condition. In late March, 2002, 1377008 Ontario Limited informed the Interim Receiver that it had determined that the business conducted by TCT at the Horner Avenue premises was not viable as a long-term operation. It exercised its right to demand a renegotiation of the purchase to exclude the Horner Avenue premises and to make a corresponding reduction in the price that it offered to pay.

The Horner Avenue premises was a large storage facility that housed an enormous quantity of goods owned by third parties. The Interim Receiver could not remain in the premises beyond May 23, 2002 and knew that it would require several weeks to wind down the business and empty the warehouse. As such, there was insufficient time available to pursue an alternative transaction which inevitably would have included a period of time for the purchaser to conduct due diligence. Moreover, given the nature of the issues raised by the numbered company, it was likely that an alternative purchaser would have had similar concerns. If an alternative purchaser could not be found who agreed to continue operations at the Horner Avenue premises, the Interim Receiver would have faced the daunting task of winding-down an enormous warehouse in a very short timeframe, all at a very significant cost and with extremely difficult logistics.

[41] *TCT Initial Decision*, *supra*, note 1, at paras. 8-9.

On March 28, 2002, the Interim Receiver and 1377008 Ontario Limited entered into a revised letter of intent, which the numbered company then assigned to Spectrum Supply Chain Solutions Inc. ("Spectrum"). Spectrum's President was TCT's former Vice-President, Warehousing and Logistics.[42] On April 12, 2002, the Interim Receiver and Spectrum entered into a binding asset purchase agreement. Under the terms of this agreement, Spectrum purchased most of the warehousing business of TCT. But it did not purchase the leases on the Horner Avenue warehouse in Toronto and one of TCT's warehouses in Calgary. Significantly, however, Spectrum solved a major problem for the Interim Receiver by agreeing to manage and assume the costs of managing the wind down of the business at Horner Avenue, and to assist in the collection of receivables at its own cost. To that end, the Interim Receiver and Spectrum also entered into a management agreement governing the terms of the winding down of the Horner Avenue business.

On April 16, 2002, the Interim Receiver held a meeting with TCT's employees, including the president of the Union. The Interim Receiver informed the employees of the impending sale to Spectrum and the court proceedings two days later to seek approval of the sale.[43] While the Union was not served with the motion, as it had never appeared in the bankruptcy court process, the president of the Union knew about the sale and the impeding court approval motion. By Order dated April 19, 2002, the bankruptcy court approved both the proposed asset sale agreement and the proposed management agreement between the Interim Receiver and Spectrum. It further directed the Interim Receiver to enter into and implement the approved transactions.[44] The sale to Spectrum, as negotiated by the Interim Receiver and approved by the bankruptcy court, resulted in the continuation of the employment of nearly three-quarters of the 225 employees of this division of TCT. The transaction with Spectrum was the best that the Interim Receiver could secure in the urgent circumstances. The Union has never appealed the sale approval Order.

The Horner Avenue warehouse was wound-down just before the three-month occupancy period expired and the Interim Receiver provided notice of the termination of the employment of all the unionized employees at the Horner Avenue warehouse. Some of these same employees were later rehired by Spectrum at another venue without regard to the Union seniority list.[45] The Union alleged that the Interim Receiver and Spectrum colluded to move the business from the Horner Avenue warehouse so that Spectrum could operate TCT's warehousing business without a union but under substantially the same management.[46]

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[42] *TCT Appeal Decision*, *supra*, note 2, at para. 10.

[43] *TCT Initial Decision*, *supra*, note 1, at para. 15.

[44] *GMAC Commercial Credit Corporation – Canada v. TCT Logistics Inc. and the companies listed on Schedule "A" hereto* (19 April 2002), Toronto 02-CL-4387 (Ont. Sup. Ct.).

[45] *TCT Appeal Decision*, *supra*, note 2, at para. 11. Note that the hiring practices of Spectrum at that venue were outside the scope of any agreement between KPMG and Spectrum.

[46] *TCT Initial Decision*, *supra*, note 1, at para. 15.

The bankruptcy court serves as the venue to balance the competing interests of a failed business in which stakeholders can advocate their interests before an impartial judge. By requiring the bankruptcy court to approve the Interim Receiver's decisions, the highly uncertain bankruptcy process acquires a degree of certainty; once a decision is approved the actors are able to implement it confidently. During the course of TCT's insolvency, however, the Union stayed outside of the bankruptcy court and eventually turned to a different venue to seek relief.

On May 13, 2002, the Union filed three applications before the OLRB. These sought, among other things, to have the Interim Receiver or Spectrum or both declared the successor employer to TCT pursuant to section 69 of Ontario's LRA.[47] The Union alleged that TCT and Spectrum had perpetrated an unfair labour practice, by negotiating the asset purchase agreement to oust the Union from the business under substantially the same management.[48] The OLRB stayed the proceedings citing section 8 of the Receivership Order and section 215 of the BIA, which both precluded proceedings outside the bankruptcy court without leave.

It was only at this juncture that the Union engaged the bankruptcy court for the first time during the receivership, but only as a means of avoiding its jurisdiction. As the Court of Appeal has noted, because of the exigencies of real time litigation, delays when bringing applications diminish their chances of success.[49] The Union moved for leave to proceed before the OLRB and it also sought an order deleting those provisions in the Receivership Order that declared that the Interim Receiver could not be deemed a successor employer.

The Receivership Order terminated the employment of TCT's employees and allowed the Interim Receiver to then hire back employees as it considered necessary or desirable. Some counsel favour this structure as an attempt to crystallize the employees' claims against the debtor a *scintilla juris* prior to the hiring of the employees by the court officer. Other counsel prefer to structure receiverships, especially under the BIA, as a mere agency whereby the debtor alone employs the employees and the receiver is never seen as an employer on the books of the debtor. There is no case law as to whether the triggering of a termination followed by a fresh hiring has a different analytical outcome than the agency structure.[50] In TCT, the Union never challenged the provision of the Receivership Order that terminated the employees' employment with TCT. Instead, the Union petitioned the bankruptcy court to delete from the Receivership Order the

[47] *LRA, supra*, note 30, s. 69.

[48] *TCT Appeal Decision*, *supra*, note 2, at para. 13.

[49] *Royal Oak Mines Inc. (Re)* (2001), 143 O.A.C. 75 at paras. 22-26 (QL): "The timeliness of the motion to vary was relevant to its chance of success. The later it was brought, the more Trilon and other lenders had at stake because the unions were in effect asking the Court to change the rules during the proceeding. Accordingly, the later it was brought, the less the motion's chance of success in fact, whatever its legal merit might have been."

[50] A monitor under the CCAA with a very limited appointment order was held to be an agent of the debtor and therefore not personally liable under the debtor's collective agreements in *Re Jeffrey Mine Inc.* (2003), 40 C.B.R. (4th) 95 (Que. C.A.). The difficulty with using an interim receiver in such a limited role is that subsection 47.2 of the BIA would not allow protection for the interim receiver's disbursements. On this basis, the interim receivership is generally combined with a broader receivership under provincial law (see: Myers, *The New Standard Form Template Receivership Order – Explanatory Notes for Version 1, September 14, 2004*, 17 Comm. Insol. R. 1

provisions that prevented the Interim Receiver from being declared a successor employer.[51] Since the OLRB has the jurisdiction to decide the Interim Receiver's status as a successor employer, the Union hoped to proceed against the Interim Receiver in the forum of its choosing. For its part, the Interim Receiver argued that the bankruptcy court was the appropriate venue to adjudicate the issues because of the court's recognized role in stewarding the entire bankruptcy process.

On April 29, 2003, Ground J.'s released the *TCT Initial Decision*.[52] Ground J. adopted the reasoning of the Farley J. in *Royal Crest Lifecare Group Inc.* ("*Royal Crest*") and in particular the "*qua* realizor" test.[53] In *Royal Crest*, Farley J. found that as long as a receiver or trustee in bankruptcy appropriately acts to maximize the value of the bankrupt's assets to satisfy creditors' claims, it can incidentally operate a business without becoming a successor employer.[54] Farley J. based this decision upon furthering the policy objective, embodied in the BIA since 1992, of facilitating going concern realizations.[55] Farley J. wrote that:

> "Coupled with the rather "new-found" objective and thrust of the BIA since the 1992 amendments with the significant social and economic policy with particular positive impact for employees and the communities in which these employees live to have businesses, if possible and practicable, sold as a going concern (such being the usual way in which to maximize value as well), it would be undesirable to saddle the Trustee with (heavy) personal liabilities which may arise either from a finding of "successor employer" against the trustee or a conclusion that a trustee who hires personnel "inherits" an operative collective agreement."

The *qua* realizor test asks "what role is the trustee truly playing – is it acting *qua* realizor of the assets or is it acting *qua* employer in essence."[56] Farley J. continued:

> 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 *bona 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 stakeholder interests in going concern preservation).[57]

Accepting this reasoning, Ground J. interpreted the TCT Receivership Order and delineated the immunity from being declared a successor employer that it offered. He found that if the Interim Receiver temporarily carried on a bankrupt business to sell it as a going concern, this could not

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[51] *TCT Initial Decision*, *supra*, note 1, at para. 26.

[52] *Ibid*.

[53] *Royal Crest*, supra, note 7.

[54] *Ibid*, at para. 24.

[55] *Ibid*.

[56] *Ibid*.

[57] *Ibid*, at para. 25.

attract successor employer liability.[58] Ground J. made the finding of fact that "it was clear to employees that the Interim Receiver was acting as a receiver to oversee a sale or liquidation of TCT's warehousing business."[59] Ground J. also found that the Interim Receiver did not give the impression that it would affirm the collective agreement or honour its terms.[60] Therefore, Ground J. found that the Interim Receiver had acted *qua* realizor of the assets, as it acted expeditiously to find purchasers for TCT's businesses and completed many sales within four months.[61] The Interim Receiver was therefore simply acting incidentally as an employer within its court-given mandate.

To determine whether to allow the Union to proceed before the OLRB, Ground J. reviewed the test for granting leave under section 215 of the BIA. As a basic hurdle to granting leave, Ground J. required that the moving party provide some factual basis for proposed OLRB proceedings.[62] In light of his finding that the Interim Receiver had acted *qua realizor*, Ground J. found that the Union could not meet its burden under section 215.[63] Thus, there was no basis to grant leave for the OLRB to adjudicate the identical issue.[64]

Importantly, *TCT Initial Decision* is limited in scope to court officers, and not to purchasers of the assets of an insolvent business from a receiver or trustee in bankruptcy. Ground J. finished his analysis by stating that the decision "would of course have no impact upon the application which the Union intends to bring before the OLRB with regard to Spectrum."[65] Spectrum, the company that bought TCT's warehousing business, has no immunity from the jurisdiction of the OLRB. If Spectrum is ultimately found to be a successor employer, it will be bound by the Union's collective agreements with TCT and liable for TCT's pre-receivership employment liabilities.

Part 2 – The Autopsy Litigation resulting from TCT's Insolvency

This part considers the evolution of the common law and federal legislative responses to the issues presented by successor rights in insolvency. The *TCT Appeal Decision* is both a retrenchment and a significant advancement.

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[58] *TCT Initial Decision*, *supra*, note 1, at para. 41.

[59] *Ibid*, at para. 53 Note that the Interim Receiver's decision not to fund existing pension obligations was an effort to insulate itself from personal liability similar to what resulted in *Re St. Marys Paper Inc.* (1994) 19 O.R. (3d) 163 (Ont. C.A.), rev'g (1993), 15 O.R. (3d) 359 (Ont. Ct. Gen. Div.) [*St. Marys*].

[60] *Ibid*.

[61] *Ibid*, at para. 45.

[62] *Ibid,* at para. 48.

[63] *Ibid*, at para. 53.

[64] *Ibid*, at para. 54.

[65] *Ibid*.

Before turning back to *TCT*, a review of the 1994 decision of Court of Appeal for Ontario in *St. Marys* succinctly illustrates the importance of certainty in insolvency law and the important role that appellate courts have in creating certainty.[66] In *St. Marys,* upon taking possession of the business, the trustee in bankruptcy endeavoured to protect and promote a harmonious relationship with the workforce. As in most operating receiverships and operating bankruptcies, the cooperation of the employees was an integral component of a successful outcome. The trustee did the right thing. It negotiated with the union to find an acceptable way to recognize all of the employees' entitlements without binding the trustee to the historical nor the future obligations under the collective bargaining agreement. The union and each employee agreed that if the trustee made ongoing contributions to *St. Marys* pension plan, then the trustee would not be accountable if an unfunded liability of the debtor was later found to exist. With this assurance in hand, the trustee agreed to fund the pension contributions. Later, the pension plan administrator took a different view of things and went to court arguing that parties cannot contract out of statutory pension obligations. In *St. Marys*, the Court of Appeal found that as a result of making contributions to the pension plan, the trustee became an "employer" under the statute and therefore the trustee became liable for unfunded pension liabilities that had accrued before the trustee was engaged. By doing so, a substantial unsecured liability of the debtor was transformed into an administrative liability of the trustee ahead of other creditors. The creditors who funded the bankruptcy and agreed to fund ongoing pension contributions were primed by a subordinate liability of the debtor they had expressly refused to undertake. This was despite an explicit agreement between the trustee and a union that such liability would not arise. In the aftermath of *St. Marys*, no receiver or trustee would risk making contributions to a pension plan despite the desirability of making full payments to the workers. No secured creditor would willingly assume the risk of liability for an undetermined and indeterminate pension deficiency.

Appellate courts unquestionably have the jurisdiction to review the bankruptcy court's real time decisions, and they unquestionably should exercise this jurisdiction. Cases concerning the *Companies' Creditors Arrangement Act* ["CCAA"],[67] the federal legislation designed to facilitate restructurings, have declared that appellate courts can help promote real time outcomes. For example, in a motion decision concerning the restructuring of Stelco Inc., Laskin J.A. recognized that an appeal court in particular is an intimate partner in "fast-moving, and often unpredictable" restructurings which requires the appellant court to "strive where it can to achieve a measure of stability and certainty."[68] .

More than two years after TCT went bankrupt, the Court of Appeal for Ontario delivered the *TCT Appeal Decision*.[69] The Honourable Madame Justice Feldman and the Honourable Madame Justice Cronk comprised the majority and allowed the Union's appeal from the *TCT Initial Decision*. Their ruling had two important components. First, they rejected the *qua* realizor test from *Royal Crest*, because they found that the jurisdiction to decide questions of successor employers lies only with the OLRB and not the bankruptcy court. Second, they

[66] *St. Marys*, *supra*, note 13.

[67] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ["CCAA"].

[68] *Stelco Inc. (Re)* (2005), 8 C.B.R. (5th) 150 at para. 4 (Ont. C.A.).

[69] *TCT Appeal Decision*, *supra*, note 2.

clarified the test under section 215 of the BIA governing leave to take proceedings outside the bankruptcy court. The majority remitted the case back to the bankruptcy court to re-evaluate the Union's motion for leave to proceed before the OLRB in light of the factors delineated by the Court of Appeal. In dissent, the Honourable Mr. Justice MacPherson would have granted the Union's motion for leave to commence successor employer proceedings before the OLRB.

The majority of the Court of Appeal rejected the *qua* realizor test by finding that the bankruptcy court lacked jurisdiction to decide successor employer issues. Feldman J.A. found that the LRA vests exclusive jurisdiction with the OLRB to decide the successor employer question.[70] Section 47 of the BIA, which allows the bankruptcy court to grant receivers many powers, does not expressly vest in the bankruptcy court any jurisdiction over successor employer issues.[71] This discussion raises the important issue of the interaction, and sometimes conflict, between provincial and federal legislation. In *Sam Lévy & Associés v. Azco Mining Inc.*, the Supreme Court of Canada emphasized the federal legislative policy favouring control in an insolvency of all the assets, property and litigation in one court.[72] Similarly in *Husky Oil Operations Ltd. v. Minister of National Revenue*, the Supreme Court highlighted the need for a single bankruptcy regime for the entire country, and not a checkerboard dictated by ten different regimes.[73] Bankruptcy and insolvency law is pre-eminently a federal area of law. This does not, however, allow the BIA to tread into provincial areas of legislative competence as is made clear in s. 72(1) of the BIA.[74] One may question whether the bankruptcy court is entitled to regulate its officers' employment relations in a province or territory that does not have successor employer legislation protected by a privative clause? If so, then section 47 of the BIA must bestow sufficient jurisdiction on the bankruptcy court and the question in other provinces perhaps is not one of jurisdiction, but one of paramountcy.

Feldman J.A. highlighted the addition of subsection 14.06(1.2) to the BIA in 1997 after the "unfortunate" decision in *St. Marys*.[75] That subsection shields receivers and trustees from liabilities that arose or are related to obligations of the debtor prior to a bankruptcy or receivership.[76] Subsection 14.06(1.2) does not protect a receiver or trustee from obligations

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[70] *Ibid,* at para. 28.

[71] *Ibid*.

[72] *Sam Lévy, supra*, note 3, at paras. 26-27.

[73] *Husky Oil, supra,* note 4, at para. 87

[74] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 72(1): "The provisions of this Act 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 conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act."

[75] *TCT Appeal Decision*, *supra*, note 2*,* at para. 63.

[76] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 14.06(1.2) [BIA]: "Notwithstanding anything in any federal or provincial law, whether 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."

arising after the bankruptcy.[77] In *Vulcan Containers Ltd.* the OLRB found that its determination that a purchaser was a successor could make that purchaser responsible for pre-bankruptcy liabilities because the liability of the successor is a fresh liability that is independent of the obligations of the bankrupt debtor.[78] Although *Vulcan Containers Ltd.* is not a case involving receivers, it is arguable that following such logic the OLRB could seek render a receiver liable for pre-receivership claims despite subsection 14.06(1.2) in the BIA.

During the litigation surrounding TCT's bankruptcy, the Interim Receiver has argued that even as a successor employer, subsection 14.06(1.2) would protect it from liability arising from the pre-receivership service of employees. Even if successor application occurs post-receivership, the liabilities all flow from pre-receivership service by employees for the debtor and mirrors the liabilities crystallized by the termination of the employees' employment upon the appointment of the receiver. The Union agreed with this proposition at the Court of Appeal and argued only for liability concerning the employment of employees during the four-month receivership and not other amounts for example, severance pay based upon pre-receivership service by employees for TCT. The Court of Appeal's formal Order consequently states: "For clarification, the parties have agreed that if any such amounts become payable by the interim receiver as a successor employer, in no event is the interim receiver to be liable for any amount that either became due or accrued prior to the date of its appointment."[79]

At the Supreme Court of Canada, however, the Union has changed its position. It argues that if the Interim Receiver is declared a successor employer, this would constitute a fresh post-receivership liability for which the Interim Receiver would be responsible. The Union's argument continues that this fresh liability would become due or accrue after the Interim Receiver was appointed and is not a claim against the debtor. Therefore, the Union argues, the Interim Receiver is not protected under subsection 14.06(1.2).[80] The Supreme Court of Canada or Parliament will ultimately have to clarify this issue: namely, whether pre-receivership notice, severance and pension claims against the debtor are sufficiently "related to a requirement imposed on the debtor" so that a receiver even as a successor employer remains immune under subsection 14.06(1.2) to such claims. If subsection 14.06(1.2) allows receivers to be liable for claims based on pre-receivership service, provinces will have finally found a way to re-order bankruptcy priorities in the employment context. This would be despite the Supreme Court's decision in *Husky Oil* and a string of prior cases in which the Supreme Court of Canada has held consistently that provincial laws cannot affect the ordering of bankruptcy priorities.[81]

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[77] *TCT Appeal Decision*, *supra*, note 2, at para. 32.

[78] *Vulcan Containers Ltd.*, [1997] O.L.R.B. Rep. 765 at para. 68.

[79] *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.* (2 April 2004), Toronto C3998 (Ont. C.A.) at para. 1. The passage was italicized in the original order because it was an added by the Court of Appeal for Ontario in its order of 2 April 2004 to Ground J.'s order of 29 April 2003. Ground J.'s order of 29 April 2003 is an amended version of the original Receivership Order of 24 January 2002.

[80] *GMAC Commercial Credit Corp.-Canada v. TCT Logistics Inc.*, case will be heard before the Supreme Court of Canada in November 2005 (Factum of the Appellant at paras. 50-53).

[81] *Husky Oil, supra,* note 4, at paras. 32-36.

A large measure of uncertainty, however, surrounds the determination of what obligations arise after bankruptcy. Take the following example. A hypothetical pension plan for a company is examined, and actuarial estimates determine the contributions required for the ensuing three years. Almost three years later, the company goes bankrupt. Its pension plan has been fully funded in accordance with its most recent actuarial report. A trustee in bankruptcy operates the company to seek a going concern sale. When the next actuarial report is issued just after the trustee is engaged, a huge funding gap is discovered that resulted because of a downturn either in predicted interest rates or in the performance of the stock market that prevented the pensioners' assets from appreciated to the degree that had been predicted in the prior actuarial report. The funding gap was not discoverable until the new triennial report was issued post-bankruptcy and clearly the company fulfilled all its responsibilities up until it went bankrupt. But, for the purposes of subsection 14.06(1.2), would this funding gap become a present liability of the trustee *qua* successor employer because it was discovered after the bankruptcy? If so, not only might an unsecured liability of the debtor become a super-priority liability of a receiver, but an unknown and indeterminate liability could later be found to have arisen as a result of funding a pension or successor employer liability.[82]

The Court of Appeal in the *TCT Appeal Decision* found that the OLRB has the sole jurisdiction to determine a receiver's successor employer status. The bankruptcy court, however, still has an important gatekeeper role in such matters because of section 215 of the BIA. The section reads:

> "Except by leave of the court no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act."[83]

The bankruptcy court can thus forestall questions concerning successor employers by denying leave to appear before the OLRB. In his dissent in the *TCT Appeal Decision*, MacPherson J.A. criticized this result because a strict section 215 test would, through the "side door" of a leave provision, effectively allow the bankruptcy court to determine the issue of successor employment status even though it lacked the jurisdiction to do so.[84] The majority and minority opinions in the *TCT Appeal Decision* essentially diverge upon the question of the appropriate test for granting leave under s. 215 of the BIA. To meaningfully preserve the jurisdiction of provincial labour boards, MacPherson J.A. would have applied the "traditional" formulation of the section 215 test, taken from the case of *Mancini (Trustee of) v. Falconi*.[85] The *Mancini* test is described as follows:

> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.

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[82] In the CCAA proceedings for *Slater Steel Inc.* and its affiliates, Farley J. stayed the obligation to file a new actuarial report expressly to prevent such a retrospective funding obligation from arising. *Re: Slater Steel Inc. et al*, Unreported, Ontario Superior Court of Justice, Farley J. September 15, 2003, Court File No. 03-CL-5028

[83] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 215.

[84] *TCT Appeal Decision*, *supra*, note 2, at para. 115.

[85] *Mancini (Trustee of) v. Falconi* (1993), 61 O.A.C. 332 (Ont. C.A.).

> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted: see *Peat Marwick Ltd. v. Thorne Riddell, supra*.
>
> 3. The court is not required to make final assessment of the merits of the claim before granting leave: see *Re Lufro Ltée; Leblond c. Tremblay* (1985), 54 C.B.R. (N.S.) 199 (Que. C.A.).[86]

The majority in the *TCT Appeal Decision* applied section 215 in a more nuanced way, the appropriateness of which is the main issue before the Supreme Court. The *Mancini* test has been characterized as a low threshold. There are rarely policy reasons to restrict leave in cases where a victim alleges that a receiver or trustee committed a tort or otherwise unlawfully caused damage. However, where the conduct in question had previously received the approval of the bankruptcy court, the threshold under section 215 is somewhat higher.[87] This recognizes a policy concern that is relevant to the desirability of granting leave. The majority in the *TCT Appeal Decision* approached the matter of how to apply section 215 in that case from first principles. They differentiated between cases seeking leave to remedy trustee wrongdoing and leave sought to determine successor employer status before the OLRB.[88] While the former merely requires a trustee to hire a lawyer to defend its conduct in court, the latter threatens the fundamental business decision of whether the receiver will operate a bankrupt company's business. As Feldman J.A. wrote, section 215 allows the bankruptcy court to address questions affecting the entire bankruptcy process and the court's control over it.

> These bankruptcy considerations are critically important where an interim receiver could be declared a successor employer of the debtor if it carries on the debtor's business in order to sell it as a going concern. Whether to carry on the business is one of the most significant decisions that the receiver must make. That decision affects the entire direction of the bankruptcy and its outcome and, importantly, the ability of the receiver to maximize the value of the bankrupt's estate for the benefit of the affected stakeholders.[89]

The Court of Appeal recognized that the bankruptcy court is entitled to consider whether a *prima facie* case of successorship has been made out. If no such case is made out, then leave will be denied as in all cases.[90]

If a *prima facie* case is made out, however, the bankruptcy court is then instructed to consider other relevant factors, some procedural and some substantive.[91] The procedural factors include the prioritization, timing and availability of resources to deal with the issues in real time. The substantive factors are not as readily identifiable. One possibility is that they may relate to

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[86] *Ibid,* at page 334 (Ont. C.A.).

[87] *Bank of America v. Willann Investments Ltd.* (1993) 23 C.B.R. (3d) 98 (Ont. Ct. Gen. Div.).

[88] *TCT Appeal Decision*, *supra*, note 2, at para. 54.

[89] *Ibid,* at para. 53.

[90] *Ibid,* at paras. 44 and 74.

[91] *Ibid*, at para. 58.

creditors' claims relative priorities, and in particular, the concern of creditors that if a receiver is found to be a successor employer, then the employees' claims may be elevated from their unsecured priority at provincial law to higher priority administrative costs under the BIA. Alternatively, the notion of substantive aspects may relate to the likelihood of the receiver being able to maintain the business as a going concern in order to maximize recovery and opportunities for continued employment. In her discussion of this matter, Feldman J.A. lists several factors that a court should consider including:

> the timing of the application, the complexity of the receivership and the demands on the receiver as it carries out its obligations, the potential duration of the period that the receiver intends to operate the business before it can be sold (normally as brief as possible), the availability of potential purchasers and their financial strength, and the likelihood that a purchaser will be declared a successor employer and assume all of the obligations under the collective agreement.[92]

In essence though, the foundational principle operative in all of these considerations is the same: leave should be granted only in so far as it fosters an efficient and fair execution of a receiver's obligations. As Feldman J.A. emphasizes, "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 the creditors and, at the same time, 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 purchase is a successor employer obliged to carry out the collective agreement."[93]

The majority's formulation of the section 215 test accepted that the bankruptcy court must balance the interests of different parties to insolvencies, while allowing receivers to operate businesses. In *Mancini* itself, the court considered such policy issues. In her analysis of the *TCT Appeal Decision*, Prof. Ben-Ishai notes that the majority's test for leave under section 215 "is well suited to the delicate balancing act that takes place in the corporate bankruptcy context."[94]

A second important feature discussed by the Court of Appeal in the *TCT Appeal Decision* relates to the importance of early negotiations between a union and the receiver. The majority found that one factor militating against leave being granted is if the receiver and the union negotiate a successful basis on which to operate the business during the receivership.[95] By emphasizing early collective bargaining, the Court of Appeal believes that the receiver will be in a position to know its rights and obligations in the employment context prior to making its decision whether to operate the business. Though a receiver may no longer avail itself of the comforts of an *ex parte* order declaring it not to be a successor employer, this line of reasoning suggests that similar certainty may nevertheless be obtained if a receiver engages in early negotiations with a union to avoid a temporary shutdown. To make the point slightly differently, certainty has not been lost for receivers; it simply derives from a different source. Conversely, although unions will not be assured of their ability to seek successor employer relief, they can be

[92] *Ibid,* at para. 58.

[93] *Ibid,* at para. 61.

[94] Stephanie Ben-Ishai, "Re-Defining the Role of the Canadian Judiciary in Bankruptcies and Receiverships" (2005) 20 B.F.L.R. 241 at 251.

[95] *TCT Appeal Decision*, *supra*, note 2, at paras. 62-64.

assured that they will be engaged in the bankruptcy process and be heard by the court and its officers. Like all stakeholders, unions can figure in the calculus by which the bankruptcy court engages in its attempt to define the "delicate balance" of varied interests. It is important to note that in order for this process to provide meaningful certainty, a decision to negotiate must, by definition, be made at the very outset of the proceeding so that the receiver and stakeholders can decide whether to undertake the risks of operating the business towards a going concern sale.

From a jurisprudential standpoint, this line of reasoning brings into sharp focus the differences between this case and both *St. Marys* and *Royal Crest*. While in *St. Marys* the Court of Appeal held that an agreement between a trade union and a trustee was unenforceable, it now seems that negotiating such an agreement is highly suggested, if not mandated. Indeed, the *ex parte* orders of the sort now prohibited by virtue of the *TCT Appeal Decision*, owe their once common presence to the belief that as a result of *St. Marys,* it would be otherwise impossible to insulate a receiver from successor employer liability should it decide to carry on the business as a going concern. It is not surprising that the death of *ex parte* orders should be accompanied by a simultaneous rejuvenation of the more suitable alternate means to obtain the desirable result of collective bargaining that was rejected in *St. Marys*. In light of the reference to the outcome of *St. Marys* as " unfortunate" by Feldman J.A., the ongoing authority of *St. Marys* seems dubious.

With respect to *Royal Crest*, a similar procedural inversion presents itself. In that case, the Court of Appeal accepted the reasoning of Farley J. that an application to proceed to the OLRB was premature on the first day of a bankruptcy following several months of activity by an interim receiver. There the bankruptcy court invoked the idea that the collective agreement was to be held in 'suspended animation,' to allow a trustee some breathing space to determine the course of the bankruptcy.[96] Given the avowed importance of early negotiations in *TCT* and the need for certainty of future obligations required to allow a receiver to decide whether to operate a business, one can question how *Royal Crest*'s notion of "prematurity" fits with *TCT*. Where courts once assumed that the hurly-burly immediately arising in bankruptcy did not provide the factual underpinning required to determine the leave issue, the Court of Appeal now requires early negotiations during the hurly-burly in order to create the required certainty.

Part 3 – Real Time litigation and Going Concern Sales

There are manifest benefits to a bankruptcy and insolvency regime that creates incentives for insolvent companies to be restructured and sold as going concerns. The fact is, going concern sales produce better results for everyone, despite procedural obstacles. Employees maintain their jobs and have a new employer, who is usually a successor employer. As illustrated by the adage, the whole is greater than the sum of its parts, the going concern business is often more valuable and therefore offers a higher return to creditors than is offered by liquidating dismembered assets. Ultimately, the sale of a business as a going concern can benefit all of the stakeholders of an insolvent business. Receivers are essential to this process, but the

[96] *Royal Crest, supra*, note 7, at para. 30.

role carries the potential for unknown liability. This uncertain liability, as was recognized by the Court of Appeal, affects the willingness of receivers and lenders to partake in the insolvency process.[97]

In announcing amendments to both the BIA and the CCAA, the federal government listed the following as the first objective of its insolvency law reforms.

> First, restructuring of viable, but financially troubled, companies will continue to be encouraged as an alternative to bankruptcy, as it saves jobs and produces better results for creditors. The use of CCAA has greatly expanded in recent years, but there are concerns that the system is prone to uncertainty. The reforms will increase statutory guidance for the CCAA, providing increased predictability and consistency, while preserving flexibility.[98]

Note that the federal government's attempt to promote the restructuring of insolvent companies is tied to the ability of the insolvency system to provide certainty. The majority in the *TCT Appeal Decision* also highlighted these twin concerns of promoting certainty and going concern sales. Feldman J.A. wrote that it was "both necessary and appropriate that the bankruptcy court use its power under s. 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."[99] Certainty and achieving going concern sales are directly related. The exercise of the court's discretion under section 215 to prevent *post-facto* changes to the legal relations among stakeholders is one method by which certainty is provided. As discussed above, subsection 14.06(1.2) of the BIA is also a method for providing certainty in insolvency proceedings. The section was enacted in response to *St. Marys* to protect court officers from becoming liable for the debtor's employment obligations. The scope of this section was resolved on consent at the Court of Appeal in *TCT* although the Union has now raised the scope of the section at the Supreme Court of Canada. If the section is found to effectively shield receivers from the debtors' accrued obligations then much, if not all, of the concerns regarding increased liabilities and shifting priorities will have been resolved. In the draft of Bill C-55 that has recently been proposed by the Minister of Industry, the Federal Government has sought to remedy any lingering ambiguity in subsection 14.06(1.2) by adding to the exclusions from liability claims "in relation to a debt or liability, present or future, to which the debtor is subject [on the date of the insolvency]". Thus, receivers should be protected from claims that successor liabilities are somehow "independent" liabilities or that they are "post-bankruptcy" claims provided that the claims were claims simply "in relation to" to claims – whether accrued or accruing, against the debtor. While secured creditors would likely prefer to avoid paying union dues or pension contributions that accrue during receiverships, if receivers and trustees are protected from accrued severance, notice and vacation pay based upon pre-insolvency service and are protected from liability for pension plan deficiencies – regardless or when discovered – there are few

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[97] *TCT Appeal Decision*, *supra*, note 2, at para. 56.

[98] Industry Canada, News Release, "Government of Canada Introduces Insolvency and Wage Earner Protection Legislation: Backgrounder Government Announces Reform of the *Bankruptcy and Insolvency Act* and *Companies' Creditors Arrangement Act*" (3 June 2005) <http://www.ic.gc.ca/cmb/welcomeic.nsf/NewsRelByDate>.

[99] *TCT Appeal Decision*, *supra*, note 2, at para 60. See Cronk J.A. at paragraph 132 for his concurrence with Feldman J.A.'s position.

objections in principle to successor rights so limited to the period of operation of the business by the court officer. Of course, under subsection 45 of the *Interpretation Act*, R.S.C. 1985, c. I-21, the amendment of a provision does not affect the interpretation of the pre-existing provision. Therefore, it is certainly possible that the current subsection 14.06(1.2) already bears this interpretation as was suggested by Feldman J.A. in the *TCT Appeal Decision* itself.[100]

A clear interpretation of the breadth of subsection 14.06(1.2) and the scope of the leave test under section 215 can enable receivers to know the risks they face when deciding whether to operate debtors' businesses. Creditors will be able to assess whether to invest the funds required to operate the business in light of known risks and costs (or at least projected costs given the weaknesses of most debtors' financial data). The third source of certainty discussed and promoted in the *TCT Appeal Decision* involves negotiation between the receivers and the unions. Feldman J.A. wrote:

> Where unions are involved, the receiver will want to meet with them in order to try and negotiate an accommodation as the basis on which the receiver can proceed to operate the business on an interim basis. There will be leverage, of course, on both sides, as it will normally be in everyone's interest that the business ultimately continue. If the parties can reach an accommodation, then the order can reflect that accommodation, together with a come-back clause to deal with changes in circumstances. If they cannot achieve a consensual accommodation, the bankruptcy judge will be positioned to assist.[101]

This passage raises two important questions. The first is the feasibility of reaching an accommodation between a union and a receiver at the onset of a receivership process. Although a laudable sentiment, given the pressing realities of real time insolvency litigation, such an outcome might be unfeasible. The second is exactly how "the bankruptcy judge will be positioned to assist" if such an accommodation is impossible.

As discussed above, Feldman J.A. envisioned an accommodation between a union and a receiver that would then be reflected in the order of the bankruptcy court which defines the receiver's powers. A quick recap of the facts surrounding the demise of TCT demonstrates how difficult such accommodations would be to reach. TCT was a large company that operated throughout North America, and employed 1,357 people who were represented by 13 unions. GMAC's discovery of financial irregularities led to recognition that TCT had overextended its credit and had no available funds. Management resigned. The ship was rudderless, with no wind in her sails and was sinking fast.

When GMAC moved for the urgent appointment of an interim receiver, it had lent over $70 million to TCT and was certainly motivated by a desire to realize on this substantial investment. Going concern sales of TCT's various businesses would undoubtedly maximize the extent of GMAC's recovery, but this required the existence of functioning businesses to sell. In late January 2002, such an outcome required immediate stewardship by a receiver in order to rescue TCT's foundering businesses. This is precisely the urgent circumstances that require immediate action that only real time litigation can provide. It is therefore difficult to fathom how a receiver arriving upon the scene would have been able to negotiate agreements to successful

[100] *TCT Appeal Decision*, *supra*, note 2, at para. 32.

[101] *Ibid*, at para. 62.

conclusions with TCT's 13 separate unions in the day or two before the receivership order was made. At some point, the time required to negotiate might see TCT's businesses move beyond the point where a going concern operation could be salvaged. At that point, liquidation would be the only option and this would be to the detriment of the recovery of creditors and to the employees who suddenly would lose their jobs.

Feldman J.A. anticipated instances when consensual agreements would prove impossible to negotiate, perhaps because of the pressing time constraints that require the immediate appointment of a receiver, or perhaps because of an impasse of the negotiations. Feldman J.A. proposed that in such cases "the bankruptcy judge will be positioned to assist."[102] It is uncertain exactly how this assistance will be offered. Perhaps the bankruptcy court will be able to facilitate urgent negotiations. Following *Royal Crest*, perhaps the court will allow a brief period of "suspended animation" in exigent circumstances. Or perhaps the court or the parties could seek to involve the provincial labour regulators - assuming they are capable institutionally of assisting in such circumstances. The creativity of the parties and the experience of the bankruptcy judge will all be brought to bear in future cases to fulfill Feldman J.A.'s promise of assistance.

If accommodations are to be reached between unions and receivers, then the method that such settlements will be enforced by the bankruptcy courts will apparently be through the use of section 215 of the BIA as a controlling mechanism. As Feldman J.A. noted,

> Without the ability in the bankruptcy court to use section 215 to deny leave, any accommodation that the receiver and the unions may reach cannot be enforced…Similarly, any agreement with a trustee must be enforceable by the bankruptcy court in order to ensure that both sides in any negotiation view the negotiations as meaningful.[103]

The only example to date as to what form such a settlement might take, was reached in June 2005, between the trustee and the union who were parties to the bankruptcy of *Royal Crest*. In that case, the trustee in bankruptcy and the relevant union reached an agreement in April 2005 that was subsequently approved by the court.[104] Significantly, the settlement agreement contains terms that are reminiscent of the terms agreed upon in *St. Marys* that the Court of Appeal found to be unenforceable in that case. As noted above however, with the majority in the *TCT Appeal Decision* referring to *St. Marys* as "unfortunate", one questions if *St. Marys* will now be taken to no longer be good law.

In the aftermath of the *TCT Appeal Decision*, orders have been employed in other insolvency cases, in which different methods of insulating receivers have been adopted. These orders, not yet tested on appeal, have relied upon recitations of the provisions of subsection 14.06(1.2) of the BIA in an attempt to limit the receiver's liability to post-receivership service by

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[102] *Ibid*.

[103] *Ibid*, at paras. 63-64.

[104] *In the Matter of the Bankruptcy of the Royal Crest Lifecare Group Inc.* (10 June 2005), Toronto 31-OR-206980-T (Ont. Sup. Ct.) (cited as "Settlement Order").

employees.[105] In one case, the bankruptcy court further protected the receiver by enjoining applications under section 215 of the BIA where the relief sought would render the receiver liable for pre-receivership service by employees.[106]

Conclusion

The Court of Appeal for Ontario's *TCT Appeal Decision* is indeed significant. Existing procedures for dealing with receiver's risk have been supplanted by a retrenchment to pre-*St. Marys* techniques requiring increased dialogue between the parties. Despite these changes and those that the Supreme Court of Canada might instigate, the Canadian insolvency system maintains a steady focus upon achieving going concern sales. The benefits of this focus are simply too important to forgo. The struggle to find certainty in insolvency law, which has been the predominant focus of this paper, still continues; at stake is the efficacy of the real time litigation process that allows going concern sales to occur in insolvency proceedings. Because of the threat that uncertainty poses to receivers, lenders and employees alike, the efficacy of the solutions that all these stakeholders can devise is an important topic of debate. Whether the solution lies simply in a purposive interpretation of subsection 14.06(1.2) in order to clarify its protection of receivers and trustees from priority-reversing liabilities, or the continued use of section 215 as a "gatekeeping" function, or both, only time will tell. But these cases are told in real time. So, we should not have to wait for too long.

[105] *HSBC Bank Canada v. Q.C. Corporation and Q.C. Packaging Systems Inc.* (2 September 2004), Toronto 04-CL-5542 (Ont. Sup. Ct.).

[106] *Canadian Imperial Bank of Canada and Royal Bank of Canada v. Premium Pork Canada Inc., Premium Pork Finishing Inc. and the Persons Listed on Schedule "A" Hereto* (24 August 2004), Toronto 04-CL-5525 (Ont. Sup. Ct.).