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Insolvency Digest

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Ivaco Inc.

CASE NAME:	<i>Ivaco Inc. (Re)</i>
COURT:	Court of Appeal for Ontario
DATE OF DECISION:	October 17, 2006
BEFORE:	Laskin, Rosenberg and Simmons JJ.A.
CITE:	

HEADLINE:

In the Matter of Ivaco Inc. the Court of Appeal for Ontario held as follows:

- a. neither the company nor the monitor in this CCAA proceeding were under an obligation to segregate funds subject to a deemed trust for unpaid contributions to a pension plan in light of the language of the PBA, the terms of the pension stay order and the status and role of the monitor;
- b. the judge supervising the CCAA was not required in law to order payment of the pension contributions at the end of the CCAA proceedings but before bankruptcy because the CCAA itself did not require the judge to execute the deemed trusts and, at the end of the CCAA proceedings, there was no gap in the insolvency legislation that would permit the execution of the deemed trust – the CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies that occupies the field and ousts the application of provincial legislation;
- c. the judge took into account the relevant factors and did not exercise his discretion improperly in lifting the stay to permit a bankruptcy petition against Ivaco to proceed;
- d. the judge who presided over the CCAA proceeding had jurisdiction and discretion under the CBCA to order the transfer of the debtors' head office from Montreal to Toronto, and the administrative convenience of the future bankruptcy proceedings was proper grounds for the exercise of such discretion.

SUMMARY:

In *Re Ivaco Inc.* the Superintendent of Financial Services (the "Superintendent") sought, on behalf of employees and retirees of Ivaco and related companies (collectively, "Ivaco"), to recover unpaid contributions to non-union pension plans.

Ivaco had sought and obtained court-ordered protection under the CCAA in September 2003. The CCAA Initial Order stayed all claims of creditors. A later order stayed Ivaco's obligation to make outstanding past service contributions and special payments to the non-union pension plans. Ultimately, Ivaco was unable to restructure and virtually all of its assets were sold, generating a pool of funds for distribution to creditors. It was out of these proceeds that the Superintendent sought to recover the unpaid contributions, on the basis of the

deemed trust and lien provisions of the provincial *Pension Benefits Act* (the "*PBA*"). The Superintendent's motion was supported by the Quebec Pension Committee (the "*QPC*").

The Bank of Nova Scotia and National Bank opposed the relief sought by the Superintendent and sought to petition Ivaco into bankruptcy.

Farley J., who had supervised the *CCAA* proceedings for over two and a half years, dismissed the Superintendent's motion and lifted the *CCAA* stay of proceedings to permitted the bankruptcy petitions to proceed, but he did not put the Ivaco Companies into bankruptcy. To facilitate the bankruptcy petitions, the motions judge also ordered that certain Ivaco head offices be transferred from cities in Quebec to Toronto.

The Superintendent appealed. She argued that the motions judge erred either in law or in the exercise of his discretion. The Superintendent submitted that the motions judge erred in law by failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount. The Superintendent contended that the *PBA* legally required that the deemed trusts for unpaid past service contributions and special payments be executed or protected before bankruptcy.

As an alternative, the Superintendent submitted that the motions judge erred by exercising his discretion to lift the stay under the *CCAA* and permit the bankruptcy petitions to proceed without first protecting the claims of the pension beneficiaries. The Superintendent contended that the motions judge exercised his discretion on a wrong principle because he ignored the unfairness and prejudice to the Ivaco Companies' most vulnerable creditors.

The Superintendent also appealed an ancillary order made by the motions judge. The Superintendent submitted that the motions judge had no jurisdiction under the *CCAA* to order the transfer of the head offices or alternatively, improperly exercised his discretion in doing so.

The Decision of the Court of Appeal of Ontario

Justice Laskin, writing for a unanimous Court of Appeal, considered three questions:

1. Did the motions judge err in law in failing to segregate the amount of the deemed trusts in a separate account or in failing to order immediate payment of the amount of the deemed trusts under the *PBA*?
2. Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed, without protecting the claims of the pension beneficiaries?
3. Did the motions judge err in law or in the exercise of his discretion by ordering the transfer of the debtors' head offices from Quebec to Toronto?

QUESTION ONE:

The court held that neither the company nor the monitor in the *CCAA* proceeding were under an obligation to segregate funds subject to a deemed trust for unpaid contributions to a pension plan in light of the language of the *PBA*, the terms of the pension stay order and the status and role of the monitor.

- The language of s. 57 of the *PBA*, creating a deemed trust, does not require the employer to hold the contributions separately, it merely creates a legal fiction. If the province had wanted to require an employer to keep its unpaid contributions to a pension plan in a separate account

then it must legislate that separation.

- The Superintendent's argument amounted to an impermissible collateral attack on paragraph 4 of the pension stay order, which stipulated that during the stay Ivaco would not incur any obligation – statutory, fiduciary or otherwise – for failing to make contributions to the plan.
- The Monitor was appointed under s. 11.7(1) of the CCAA to “monitor the business and financial affairs” of the Companies, and was given the functions set out in s. 11.7(3) of that statute: to examine the Companies' property, report to the court on the Companies' business and financial affairs and keep the creditors informed. Although the motions judge gave the Monitor additional powers, they were limited. The Monitor was given authority to deal with day-to-day administrative matters, to finalize the sale of Ivaco's assets and to receive and control the proceeds of sale. In these circumstances, it could not be said that the Monitor “stands in the shoes of the Companies”.

The court also decided that the motions judge was not required in law to order that the amount of the deemed trust be paid at the end of the CCAA proceeding, but before bankruptcy, having regard to the provisions of the CCAA and the scheme of priorities set out in the BIA.

- The CCAA did not require the motions judge to execute the deemed trusts and the Superintendent could not point to any section of any statute where a legal obligation to order payment of the past service contributions could be found.
- In order for the Superintendent's position to be correct, there would have to be a gap between the end of the CCAA period (once restructuring was not possible and the CCAA proceedings were spent) and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallizes before the rights of all other creditors, including their right to bring a bankruptcy petition. The court found that all rights must crystallize simultaneously at the end of the CCAA period, and that there is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. The court observed that the situation would be the same even if no bankruptcy petition was pending.

QUESTION TWO:

The court held that the motions judge did not exercise his discretion improperly in lifting the stay to permit a bankruptcy petition against Ivaco to proceed. The court reviewed the motions judge's decision and concluded that he had taken into account the likely result of the Superintendent's claims if the Ivaco Companies are put into bankruptcy. Furthermore, the motions judge had recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Therefore, having weighed all the competing considerations, the motions judge had properly exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed.

QUESTION THREE:

The court held that the motion judge had jurisdiction and discretion under s. 191 of the *BCA* to order the transfer of the debtors' head office from Montreal to Toronto. The administrative convenience of the future bankruptcy proceeding was proper grounds for the exercise of such discretion.

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