

## RESTRUCTURING BULLETIN

September 2006

### **T.C.T. LOGISTICS INC.: SUCCESSOR EMPLOYER ISSUES IN INSOLVENCY**

On July 27, 2006, the Supreme Court of Canada released its decision in *GMAC Commercial Credit Corporation (“GMAC”) and T.C.T. Logistics Inc. et. al v. Wood & Allied Workers of Canada, Local 700*<sup>1</sup> (“*TCT Logistics*”). In a 7 to 1 decision, the Supreme Court confirmed that (i) the Bankruptcy Court does not have jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *Labour Relations Act, 1995*; and (ii) the test for leave to commence proceedings against a trustee in bankruptcy or an interim receiver is a low one. The practical effects of the decision will be to discourage the use of receivers to attempt to sell businesses on a going concern basis, and to increase the chances of shut down liquidations in marginal situations.

#### **BACKGROUND**

Upon T.C.T. Logistics Inc.’s (“TCT”) insolvency, its second largest secured creditor applied for an order appointing KPMG Inc. as interim receiver. The appointment order (the “Appointment Order”) provided that (i) the employment of TCT’s employees was terminated; and (ii) the interim receiver could not be considered a “successor employer” of TCT. KPMG, on behalf of TCT, later filed an assignment in bankruptcy. The interim receiver subsequently sold the majority of the assets of TCT’s business to a new company. The interim receiver continued to use the services of TCT employees for several months following its appointment. Once the remaining warehouse business of TCT was wound down, the remaining unionized employees working at the warehouse were terminated. Certain of these employees were re-hired by the purchaser, although not in accordance with the union’s seniority list.

The union applied to the Ontario Labour Relations Board (“OLRB”) for a declaration that the purchaser was a successor employer to TCT or the interim receiver and, accordingly, was bound by the collective agreement in place at the time of sale. Relying on section 215 of the *Bankruptcy and Insolvency Act* (the “BIA”), which prevents the commencement of proceedings against an interim receiver or trustee in bankruptcy without leave of the Bankruptcy Court, the interim receiver obtained a stay of the union’s application. The union then sought leave from the Bankruptcy Court to proceed with its application to the OLRB, and requested that the Bankruptcy Court remove those portions of the Appointment Order which provided that the interim receiver could not be considered a successor employer.

#### **LOWER COURT DECISIONS**

The Bankruptcy Court amended the Appointment Order, but declined to remove that part of the order which provided that the interim receiver could not be found to be a successor employer under the applicable labour relations legislation. The bankruptcy judge concluded that, if this protection was removed, it would be unduly burdensome on an interim receiver or trustee engaged in temporary and limited employment relationships for the purpose of realizing the debtor’s assets. Having concluded that the successor employer provisions of the Appointment Order, as amended, were valid, the Bankruptcy Court also refused to grant leave to the union to proceed before the OLRB.

The union appealed the decision and the Ontario Court of Appeal unanimously concluded that the OLRB had exclusive jurisdiction to determine successor employer issues, and that the Bankruptcy Court could not immunize an interim receiver from a successor employer declaration. However, the Court of Appeal was divided on the issue of the test for leave under section 215 of the BIA. The majority was of the view that the traditional test for leave represented too low of a threshold when applied to successor employer issues and devised a more stringent test for leave which required

<sup>1</sup> 2006 S.C.C. 35.

<sup>2</sup> For a detailed summary of the Ontario Court of Appeal’s decision in *TCT Logistics*, please see our Employment and Labour Relations Bulletin entitled *Court of Appeal Empowers Trade Unions on Receiverships and Bankruptcies* written by David Elenbaas and H.P. Rolph published in April 2004, which can be found at the link below:

[http://www.mcmbm.com/Upload/Publication/trade\\_unions\\_receivership\\_%20bankruptcies0404.pdf](http://www.mcmbm.com/Upload/Publication/trade_unions_receivership_%20bankruptcies0404.pdf)

consideration of a number of additional factors. The Court set aside the Bankruptcy Court's order refusing to grant leave and remitted the leave application back to the Bankruptcy Court for reconsideration.

#### **SUPREME COURT DECISION**

The union appealed the refusal to grant leave under section 215 of the BIA and GMAC brought a cross-appeal on the Court of Appeal's finding that the Bankruptcy Court lacked jurisdiction to make successor employer declarations. Justice Abella, a former chair of the OLRB, wrote the majority decision of the Supreme Court and upheld the Court of Appeal's conclusion that determination of successor employer issues was beyond the jurisdiction of the Bankruptcy Court. Analysing section 47(2) of the BIA, under which KPMG had been appointed interim receiver, Justice Abella concluded that the "statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended". Moreover, Justice Abella acknowledged that, while flexibility was required in bankruptcy situations, "guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach" of the BIA. As such, the Court set aside those sections of the Appointment Order that immunized the interim receiver from successor employer liability.

On the issue of the applicable test for granting leave under section 215 of the BIA, the Supreme Court rejected the new test formulated by the Court of Appeal and reinstated the traditional test enunciated by the Ontario Court of Appeal in *Mancini (Bankrupt) v. Falconi*<sup>3</sup> which provides for leave to be refused if a claim is frivolous, vexatious or manifestly unmeritorious. The Court concluded that to "impose a higher s. 215 threshold when it is a labour board issue is to read into the BIA a lower tolerance for the rights of employees represented by unions than for other creditors". Applying the traditional test for leave under section 215 of the BIA, the Supreme Court granted leave to the Union to bring its proceeding before the OLRB.

#### **GOING-FORWARD CONSIDERATIONS**

The decision by the Supreme Court in *TCT Logistics* appears to have conclusively addressed the issues on appeal; however, the effect of the decision adds further uncertainty to the status of interim receivers, receivers and trustees in bankruptcy as successor employers. The OLRB is an administrative tribunal which is not bound to follow its prior decisions. Accordingly, determinations as to successor employer liability by the OLRB would occur on a case-by-case basis, providing interim receivers, receivers and trustees with little direction or assurances as to how best to modify their activities to avoid such liability. Although the OLRB's decisions may be subject to judicial review, where the OLRB's jurisdiction in respect of a matter is clear (as it is in the case of successor employer declarations) a decision of the OLRB will be overturned on appeal only if the decision is patently unreasonable. Given this high standard of review, it is unlikely that interim receivers, receivers or trustees will find much comfort.

The Supreme Court's decision attempts to encourage earlier participation of unions in insolvency/restructuring proceedings. Justice Abella suggests in a postscript to her decision that, rather than appointing receivers without notice to the unions, debtors and major creditors may obtain a better result by engaging in discussions with unions in advance. She notes that, "while negotiations with unions on important decisions may not eliminate a subsequent claim for successor employer liability, they could potentially yield a greater possibility for resolution than ignoring them would".

*Written by Lisa Kerbel Caplan and Tusbara Weerasooriya*

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<sup>3</sup> (1993), 61 O.A.C. 332

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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*For further information, please contact one of the McMillan Binch Mendelsohn restructuring lawyers listed below:*

Patrice Beaudin	514.987.5006	patrice.beaudin@mcmbm.com
Lisa Brost	416.865.7186	lisa.brost@mcmbm.com
Hilary E. Clarke	416.865.7286	hilary.clarke@mcmbm.com
Jeffrey B. Gollob	416.865.7206	jeff.gollob@mcmbm.com
Brett G. Harrison	416.865.7932	brett.harrison@mcmbm.com
Judie K. Jokinen	514.987.5026	judie.jokinen@mcmbm.com
Reema Kapoor	416.865.7082	reema.kapoor@mcmbm.com
Andrew J.F. Kent	416.865.7160	andrew.kent@mcmbm.com
Lisa H. Kerbel Caplan	416.865.7803	lisa.kerbel.caplan@mcmbm.com
Daniel V. MacDonald	416.865.7169	dan.macdonald@mcmbm.com
Paul G. Macdonald	416.865.7167	paul.macdonald@mcmbm.com
Adam Maerov	416.865.7285	adam.maerov@mcmbm.com
Alex L. MacFarlane	416.865.7879	alex.macfarlane@mcmbm.com
Max Mendelsohn	514.987.5042	max.mendelsohn@mcmbm.com
Marc-André Morin	514.987.5082	marc-andre.morin@mcmbm.com
Julie Normand	514.987.5012	julie.normand@mcmbm.com
Wael Rostom	416.865.7790	wael.rostom@mcmbm.com
Nicholas Scheib	514.987.5091	nicholas.scheib@mcmbm.com
Martin Scheim	514.987.5039	martin.scheim@mcmbm.com
Éric Vallières	514.987.5068	eric.vallieres@mcmbm.com
Tushara Weerasooriya	416.865.7262	tushara.weerasooriya@mcmbm.com

## McMILLAN BINCH MENDELSON

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TORONTO | TEL: 416.865.7000 | FAX: 416.865.7048

MONTRÉAL | TEL: 514.987.5000 | FAX: 514.987.1213

[www.mcmbm.com](http://www.mcmbm.com)