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1329 Bay St.
Toronto, Ontario, M5R 2C4
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JEFFREY CARHART
Partner
Miller Thomson LLP

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*Jeffrey C. Carhart**

I. INTRODUCTION

The receivership system has long been at the core of the insolvency process in Canada.

Traditionally, the receivership system[1] in Canada has functioned well. It has, among other things, served to preserve the going concern value of insolvent businesses and other businesses for the benefit of *all* stakeholders, including employees, more effectively than has been the case in some other major countries. The high level of quality and expertise of the receivership profession in Canada is one of the fundamental reasons for this level of success.

However, an insolvency situation is one in which, by definition, there is not enough money to go around. There have always been various stakeholders who have sought to attack the receivership process in some way — all in the name, of course, of trying to elevate the position of *their* claim in the process and/or to fix liability for *their* claim on someone with deep pockets, such as a receiver or the secured creditor who initiated the appointment of the receiver, and who presumably gave the receiver an indemnity agreement with respect to the receivership.

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* Partner, Miller Thomson LLP.

1. What is a receiver? The Bankruptcy and Insolvency Act definition provides in part that it is "a person who has been appointed to take, or has taken, possession or control . . . of all or substantially all of . . . the inventory . . . accounts receivable, or . . . other property of an insolvent person." (R.S.C. 1985, c. B-3, s. 243(2)). In his book *Bennett on Receiverships*, 2nd ed. (Toronto, Carswell, 1999) Frank Bennett writes at pp. 1-2: "The term 'receiver' is used to describe a person who has been appointed to take possession of property belonging to a third party . . . A person who has the power to take possession and dispose of the assets and the power to carry on the business is called a receiver and manager or a receiver/manager. In practice, a receiver is usually appointed as both a receiver and manager . . .".

Thus, a long-running process of "give and take" has occurred over the years in Canada which has generated much case law and some legislative amendment concerning the legitimate scope and implications of receiverships. Many of those legislative amendments have been designed to provide protection for receivers in order to support the viability of the receivership process. One obvious example is the legislation protecting receivers, to a limited extent, from liability for environmental problems associated with the insolvent business. As I discussed in a 2002 article,[2] if receivers and trustees in bankruptcy did not receive some measure of protection, a scenario could arise in which no qualified professional in Canada with the expertise to deal with the situation most effectively would be willing to take carriage of the business assets of an insolvent company that had created (and effectively abandoned) an environmental problem. In other words, ultimately, some attacks on the receivership process could be so severe that they would make the very concept of a receivership unviable and so force the use of another (potentially less efficient) approach.

This process of give and take has also continued in Canada during a time when there has been a shift from the use of privately appointed receivers, which were the norm in the past, to court appointed receivers, which are more common today. Many insolvency practitioners thought that the process had turned a corner as a result of the amendments to the Bankruptcy and Insolvency Act[3] (BIA) in 1992 and the introduction, at that time, of two fundamental provisions: (i) an expansion of the section of the BIA dealing with the appointment of interim receivers, and giving courts wide discretion to appoint receivers on a national basis and (ii) additional BIA provisions which seemed designed to insulate receivers that carry on the business of the debtor or continue to employ the debtor's employees from attack with respect to claims arising prior to the receivership.

However, as history has shown, the 1992 amendments did not represent the end of disputes about the ability of unions to attack receivers. Indeed, those attacks continued and, as many have suggested, may have reached a crescendo with the decision of the Supreme Court of Canada in the case of *GMAC Commercial Credit*

2. Jeffrey C. Carhart, "Environmental Issues in Corporate Insolvencies and Reorganizations" (2002), 51 U.N.B.L.J. 243.
3. R.S.C. 1985, c. B-3.

Corp.-Canada v. TCT Logistics Inc.[4] (commonly referred to as the *TCT Logistics* case). Some have suggested that, since the *TCT Logistics* decision, the receivership process in Canada is now in severe trouble.[5] The theme of this article is that as disappointing as the *TCT Logistics* decision may be to insolvency practitioners, it does not represent the end of the road either for receiverships or for efforts to maximize the value of insolvent businesses for the benefit of all stakeholders including employees. Rather, because the *TCT Logistics* decision does not grapple with all of the issues in question in this area,[6] more case law is probably going to be necessary.

II. DEVELOPMENTS PRIOR TO *TCT LOGISTICS*

Historically, as noted, most receiverships in Canada were initiated privately by secured creditors exercising rights under private security agreements. That is not to say that court appointed receiverships are entirely a recent phenomenon in Canada. Indeed, s. 101 of the Ontario Courts of Justice Act has long contained a provision allowing courts to appoint a receiver over the assets of a company where it is "just or convenient" to do so.[7] Historically many receiverships in Ontario were instituted using that section — for example, in the context of estate litigation and shareholders' disputes, including oppression remedy litigation. Section 101 of the act was also repeatedly used as the basis for the appointment of a receiver of an insolvent company where, as sometimes happened, a secured creditor had first sought to appoint a receiver privately but the debtor had refused to allow the receiver onto the premises.

During the era beginning in the mid-1970s and ending in the early 1990s, there were a number of receivership cases in which labour unions sought to fix responsibility on a receiver[8] for what

4. (2006), 271 D.L.R. (4th) 193, 22 C.B.R. (5th) 163, 51 C.C.E.L. (3d) 1 (S.C.C.).
5. At the September 2006 conference of the Insolvency Institute of Canada, for example, one of the panel discussions was entitled *Receivers — Are They Moribund*?
6. By, for example, not grappling with the application of s. 14.06 of the BIA as discussed below.
7. Courts of Justice Act, R.S.O. 1990, c. C.43. Section 101 of this act is notably terse and open-ended. In full, the section reads as follows:

> 101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.
>
> (2) An order under subsection (1) may include such terms as are considered just.

8. Or a management company hired by the receiver.

might broadly be termed "successorship obligations". The current provisions of the Ontario Labour Relations Act, 1995[9] making possible such a finding are discussed below. For the moment, reference may be made to the following cases from this era where unions were successful in such an effort:

- *Teamsters Local Union No. 879 v. Hamilton Cargo Transit Ltd.*[10]
- *Mount Citadel Ltd. (Re)*[11]
- *Maritime Life Assurance Co. v. Château Gardens (Hanover) Inc.*[12]
- *Uncle Ben's Industries Ltd. (Re)*[13]
- *RASL Ventures Ltd. (Re)*[14]
- *Windsor Packing Co. v. McArthur*[15]
- *Nathan Hennick & Co. Ltd. (Re)*[16]

On the other hand, there were a number of cases during this period in which unions were unsuccessful in fixing receivers with such successor liability status.[17] Reference may be made to the following cases in that regard:

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9. S.O. 1995, c. 1, Sch. A.
10. [1983] O.L.R.B. Rep. June 887.
11. [1976] O.L.R.B. Rep. July 367.
12. (1983), 48 C.B.R. (N.S.) 9, 2 D.L.R. (4th) 553, 43 O.R. (2d) 754 (Ont. H.C.J.).
13. [1979] 2 C.L.R.B.R. 126 (B.C.L.R.B.).
14. (1987), 17 C.L.R.B.R. (N.S.) 2 (B.C.L.R.B.).
15. (1985), 58 C.B.R. (N.S.) 1, 13 O.A.C. 321 (S.C.).
16. 1978 CarswellOnt 748 (Ontario Employment Standards Branch: Office of Adjudication) (Davis, Referee).
17. In general terms, in many of these cases the Labour Board, the Employment Standards Branch and the courts focused on a distinction between situations where, in their view, the receiver was:
    (i) carrying on the business as agent for the debtor company (and in which case the receiver was not fixed with successor employer liability on the basis that there had not been the requisite disposition/sale or change in control of the business); and
    (ii) acting as principal (and in which case the receiver *was* found to be liable as a successor employer because such a disposition/sale was found to have occurred).

    Again in general terms, in many of these cases privately appointed receivers were viewed as fitting more comfortably in the first category and court appointed receivers in the second. Two typical comments in that regard are that of the Employment Standards Branch Referee in the *Nathan Hennick* case, *supra*, footnote 16, to the effect that, "a Court appointed Receiver . . . has a fiduciary responsibility to persons of disparate interests . . . and in respect of the running of the business he exercises a totality of control equivalent to that of ownership" (at para. 11) and that of Van Camp J. in the *Château Gardens* case, *supra*, footnote 12, to the effect that, "there is no sale of the business under [the successor employer provisions of the governing legislation] to

- *Armstrong v. Coopers & Lybrand Ltd.*[18]
- *United Food and Commercial Workers v. National Bank and Price Waterhouse*[19]
- *Toronto-Dominion Bank v. Leonard Industries Ltd.*[20]
- *United Brotherhood of Carpenters and Joiners of America v. T.D. Bank and Price Waterhouse Ltd.*[21]
- *London and District Service Workers Union, Local 220 v. Price Waterhouse and CIBC*[22]
- *Ben Axelrod (Re)*[23]

As noted, many practitioners felt that a turning point was reached in this area in 1992 with the comprehensive amendments to the Bankruptcy Act — which was then renamed the Bankruptcy and Insolvency Act. In particular, the BIA introduced several fundamental changes to the law and practice in this area in Canada,[24] including the following:

- For the first time, secured creditors became subject to a requirement to give ten (10) days' written notice (in prescribed form)[25] before beginning the enforcement of security over the commercial assets of a business debtor.[26]

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a private receiver as the company keeps legal and equitable ownership and its obligations continue" (at para. 9). However, the case law is not completely consistent in this regard. Also, it may be noted that in the *Ben Axelrod* case the Employment Standards Branch Referee concluded that a court appointed receiver was not liable as a successor employer. Referee Davis held in *Ben Axelrod, infra,* footnote 23, that an appointment of a receiver by way of court order will not "inevitably" constitute the requisite "sale of the business" in every case. In the *Ben Axelrod* case he held that the particular court appointment order in question was "consistent [only] for a temporary holding operation and preserving the status quo and [did] not contemplate any wider exercise of dominion over the business and assets" (at p. 5).

These two lists of decisions are not presented as exhaustive. Also, see the discussion below with respect to the *H & S Reliance* case.

18. (1986), 24 D.L.R. (4th) 516, 53 O.R. (2d) 468, 58 C.B.R. (N.S.) 209 (H.C.), affd 61 O.R. (2d) 129, 42 D.L.R. (4th) 189, 65 C.B.R. (N.S.) 258 (C.A.), application for leave to appeal to S.C.C. refused [1988] S.C.C.A. No. 56.
19. [1983] O.L.R.B. Rep. June 944.
20. (1983), 49 C.B.R. (N.S.) 241 (Sask. Q.B.).
21. [1979] O.L.R.B. Rep. January 50.
22. [1983] O.L.R.B. Rep. October 1706.
23. May 7, 1987, E.S.C. 2241 (Ontario Employment Standards Branch) (Davis, Referee).
24. The amendments at that time also included restatements of protective provisions that had previously applied only in favour of trustees in bankruptcy to make clear that such provisions also thereafter applied to protect receivers.
25. Bankruptcy and Insolvency Act, s. 244.
26. It may be noted that the ten (10) day Bankruptcy and Insolvency Act notice as to a secured creditor's intention to enforce security was not stated to replace the common

- The provisions of the old Bankruptcy Act allowing for the appointment of an "interim receiver" were expanded from provisions that merely allowed for the appointment of such an interim receiver in a limited "watch dog" role pending the hearing of a contested petition in bankruptcy to provide, unmistakably (in a new s. 47 of the BIA), wide discretion to the court in setting the terms of such an appointment of an interim receiver.[27] Specifically, the language of s. 47 now reads as follows:

> 47 (1) Where the court is satisfied that a notice is about to be sent or has been sent under subsection 244(1), the court may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates, for such term as the court may determine.
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, *as the court considers advisable*; and
>
> (c) take such other action *as the court considers advisable.* (emphasis added)

- Section 14.06 of the BIA was clearly designed to protect receivers from liability for certain "pre-appointment" matters relating to a debtor company; s. 14.06(1.2) provides as follows:

> Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or

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law concept of reasonable notice being required with respect to a demand for repayment of indebtedness. The reasonable notice requirement had been the subject of a number of important cases starting in the early 1980s. Reference may be made to *Lister (Ronald Elwyn) Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1; *Mister Broadloom Corp. (1968) Ltd. v. Bank of Montreal* (1979), 101 D.L.R. (3d) 713, 25 O.R. (2d) 198, 7 B.L.R. 222 (Ont. H.C.J.), revd 4 D.L.R. (4th) 74, 44 O.R. (2d) 368, 1 O.A.C. 52 (C.A.), leave to appeal to S.C.C. refused [1984] 1 S.C.R. v; *Whonnock Industries Ltd. v. National Bank of Canada* (1987), 42 D.L.R. (4th) 1, [1987] 6 W.W.R. 316, 16 B.C.L.R. (2d) 320 (C.A.), leave to appeal to S.C.C. refused 43 D.L.R. (4th) viii and *Kavcar Investments Ltd. v. Aetna Financial Services Ltd.* (1989), 62 D.L.R. (4th) 277, 70 O.R. (2d) 225, 35 O.A.C. 305 (C.A.).

27. See Allan Rutman, John Varley and Jeff Carhart, "Interim Receivers Under the Bankruptcy and Insolvency Act" (1999), 9 C.B.R. (4th) 89. This wide-ranging ability of the court to appoint a receiver was by way of obvious counterbalance to the imposition of limitations on secured creditors as a result of the new ten (10) day notice period before security enforcement.

> 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.[28]

- Section 215 of the BIA also provides a bulwark against litigation against receivers, by imposing a general stay against such proceedings without leave of the court. Specifically, s. 215 provides as follows: "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."

Against this backdrop, the use of court-based interim receiverships grew significantly during the period from the early 1990s to the present.

Indeed, it is easy to identify a host of other reasons for the movement towards court-based receiverships, particularly where the company in question is in financial difficulty. As I noted in a 2005 article,[29] the advantages of court-based receiverships include the following:

1. With a court order, certain provisions can be included that help to stabilize the debtor's situation and thereby preserve the opportunity to operate the debtor's business — and perhaps also sell it — as a going concern. Those types of provisions can include the following:
   (a) A provision imposing a stay of proceedings by other creditors against the debtor or the receiver without either the consent of the receiver or leave of the court (on specified notice).[30]

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28. In *Colour Box Ltd. (Re)* (1995), 21 O.R. (3d) 746, 29 C.B.R. (3d) 262 (Gen. Div.). Lissaman J. confirmed that a receiver is not liable for pre-appointment liabilities of the debtor and that a court appointed receiver is a "receiver" for the purposes of s. 14.06(1.2) of the BIA.
29. "Appointing a Receiver and Seizing Equipment" (2005), 22 Nat. Insolvency Rev. 53 at pp. 53-54. It may be noted that both private receiverships and attacks against receivers by unions based on allegations that such a receiver was a successor employer continued after the early 1990s. For example, reference may be made to the discussion of the *H & S Reliance* case at footnotes 38 and 54, below.
30. As noted in *Bennett on Creditors' and Debtors' Rights and Remedies,* 5th ed. (Toronto, Carswell, 2006), pp. 384-85, the stay results in the preservation of an existing lease, and the ability to remain in occupation of the existing leased premises may be an integral part of the

(b) A provision mandating that people who supplied product to the debtor prior to the order must continue to provide that supply after the order.[31]

(c) A provision approving (customized terms relating to) "debtor in possession" (DIP) financing during the receivership. In that regard, for example, the court order might establish a first ranking charge in favour of the DIP financier for funds advanced during the receivership.

2. When it comes to the sale process itself, the receivership order can dispense with the need to send out "notices of sale" under various governing legislation — such as the PPSA and the Mortgages Act (Ontario).

3. If a purchaser can be located, then the court appointed receivership mechanism can provide for sale approval orders and vesting orders. In that regard:

(a) A sale approval order can reduce or eliminate the risk of litigation by subordinate creditors or indeed the "debtor itself" based on allegations of an improvident sale.

(b) A vesting order can address the needs of the purchaser to acquire "clean title" on a speedy basis. In particular, where there may be a dispute over entitlement to

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realization for the benefit of all stakeholders. As a result, for a landlord to terminate the lease, it will have to obtain leave to lift the stay and the courts will look at the balancing of interests between other stakeholders and the landlord in determining whether to do so. Examples of cases where the court has refused to lift the stay to allow a landlord to terminate a lease in a receivership context are *Gentra Canada Investments Inc. v. 724270 Ontario Ltd. (Receiver of)*, [1994] O.J. No. 2044 (QL), 50 A.C.W.S. (3d) 310 (Gen Div.) (Lane J.), affd [1995] O.J. No. 771 (C.A.) and *General Motors Corp. v. Tiercon Industries Inc.*, [2005] O.J. No. 3750 (QL), 35 R.P.R. (4th) 268 (S.C.J.) (Hoy J.), affd [2006] O.J. No. 1804 (QL), 42 R.P.R. (4th) 194 (C.A.).

31. There are numerous authorities supporting the proposition that receivers can be held personally liable for day-to-day transactions incidental to the operation of the financially troubled business and that receivers are personally responsible for trade debts incurred by them during the receivership. The English position is set out in *Glasdir Copper Mines Ltd. (Re)*, [1906] 1 Ch. 365 (C.A.) and in *Burt v. Bull and Ward* (1894), 64 L.J.Q.B. 232 (C.A.). The Canadian position is similar, as illustrated in *J.H. Smith and Son (Re)* (1929), 10 C.B.R. 393 (Ont. S.C.) and in *Bank of Montreal v. Steel City Sales Ltd.* (1983), 47 C.B.R. (N.S.) 15, 148 D.L.R. (3d) 585, 57 N.S.R. (2d) 396 (S.C.). *Steel City* determined that a receiver may be held liable for occupation rent for the period of the receiver's actual occupation of the subject premises and found that, absent an agreement or statutory provision, occupation rent is at the rate reserved in the original lease.

proceeds from the sale of certain assets that are dissipating in value while the dispute rages, such a vesting order can effectively allow for the substitution of money for the assets, such that the competing creditors can fight over the proceeds of the sale of the assets instead of the assets themselves.

4. Orders appointing a receiver may provide for various customized charges in favour of, for example, the receiver itself with respect to its fees and disbursements and other parties.
5. A court appointed receiver may be more readily recognized in other — particularly U.S. — jurisdictions than would be a receiver appointed privately. In particular, the United States Bankruptcy Code specifically contemplates recognition of "foreign representatives" within a "foreign proceeding". A receiver appointed by an Ontario Superior Court of Justice will more easily be able to attain such recognition in the United States than would a privately appointed receiver.
6. Generally speaking, American creditors have become much more involved in Canadian insolvency proceedings and it is equally true on a general level that American creditors are simply more used to having liquidation and insolvency proceedings conducted by a court-based process.
7. Depending on the industry within which the debtor carries on business, it may be possible to craft customized provisions for the order so as to address particular concerns with respect to that industry.

Of course, the foregoing list of advantages of court-based receiverships could also be characterized as being a list of things that are good or desirable about receiverships from the viewpoint of *all* stakeholders, including employees. In plain terms, with a bit of support in the form of broad based powers, duly authorized by s. 47 of the BIA, a receivership can provide the vehicle for the preservation of jobs — avoiding an abrupt, immediate termination of employment — while a final, professionally conducted, focused effort to find a buyer for the employer's business can be pursued. No one expects the employees to "work for free" during this period; of course, in fact, wages for services rendered are always paid. Also, I think almost all employees would agree that they would rather see

the receiver make an effort to find a buyer than have their employment terminated without such an effort and see the assets of the business summarily liquidated instead.

III. THE *TCT LOGISTICS* CASE

The *TCT Logistics* case began in January 2002. It involved the court appointed receivership of a group of companies, based in Calgary, with widespread operations across North America in a number of industries, including trucking, logistics and warehousing. When the receivership began, the affairs of the companies were in serious disarray. There were also more than 1,300 employees.

The original order of the Ontario Superior Court of Justice appointing the receiver was made on the application of GMAC Commercial Credit Corp.-Canada, the main secured creditor. The order included what were then typical ("state of the art") provisions imposing a stay of proceedings against the receiver, granting the receiver powers to run the business and insulating the receiver from claims based on an allegation that the receiver was a successor employer (and thereby, among other things, bound by any collective agreements).

In litigation arising in connection with the sale of the warehousing business,[32] the Industrial Wood and Allied Workers of Canada, Local 700 (the Union) challenged those provisions in the order. As summarized by Ground J. in his trial level decision:[33]

> The [appointment] Order . . . provides for . . . the following provisions in respect of which the Union is seeking to have the words in italics deleted:
>
> Receiver's Powers
>
> 3. This Court Orders that, subject to the terms of the Credit Agreement (as hereinafter defined), the Receiver is hereby empowered and authorized for and on behalf and in the name of any of the Debtors to take possession and control of the Property and any and all proceeds, receipts and disbursements arising out of or from the Property, until further order of this Court, and to act at once in respect of the Property and, without in any way limiting the generality of the foregoing and in furtherance thereof, the Receiver is hereby, expressly empowered and authorized on the Receiver's behalf, but not obligated:
>
> (h) To engage, retain and to discharge or terminate such agents, assistants and employees of any of the Debtors as the Receiver may

32. The facts of the case are discussed further in footnote 39, below.
33. (2003), 42 C.B.R. (4th) 221 at p. 226 (S.C.J.).

> consider necessary or desirable *provided that such employment shall not constitute the Receiver a "successor employer" to any of the Debtors within the meaning of the Labour Relations Act R.S.O. (1990) c. L-2 or any other provincial or federal statute or otherwise.*
>
> No Proceedings against the Receiver
>
> 8. This Court Orders that no actions or proceedings shall be commenced against KPMG Inc. or the Receiver in any Court or other tribunal unless the leave of this Honourable Court is first obtained on motion on at least seven (7) days notice to the Receiver or KPMG Inc. *and upon further order securing, as security for costs, the solicitor and his own client costs of the Receiver or KPMG Inc. in connection with any such action or proceeding.*
>
> Employees
>
> 15. This Court Orders that the employment of the Debtors, including employees on maternity leave, disability leave and all other forms of approved absence is hereby terminated effective immediately prior to the appointment of the Receiver. *Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the Receiver is not and shall not be deemed or considered to be a successor employer, related employer, sponsor or payer with respect to any of the employees of any of the Debtors or any former employees with* [sic] *the meaning of the Labour Relations Act (Ontario), the Employment Standards Act (Ontario), the Pension Benefits Act (Ontario), Canada Labour Code, Pension Benefits Standards Act (Canada) or any other provincial, federal or municipal legislation or common law governing employment or labour standards (the "Labour Laws") or any other statute, regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between any of the Debtors and any of their present or former employees, or otherwise. In particular, the Receiver shall not be liable to any of the employees of the Debtors for any wages (as "Wages" are defined in the Employment Standards Act (Ontario)), including severance pay, termination pay and vacation pay, except for such wages as the Receiver may specifically agree to pay. The Receiver shall not be liable for a contribution or other payment to any pension or benefit fund.*

The Union also sought leave to commence proceedings against the interim receiver (KPMG Inc.) before the Ontario Labour Relations Board.

1. The Trial Decision

Ground J. deleted the provision requiring the posting of security for costs as a precondition to commencing all proceedings against the interim receiver but he upheld the validity of the provisions of

the order staying proceedings against the receiver without leave of the court.

Ground J. also carefully considered the relationship between the wide discretion given to courts to appoint interim receivers under s. 47 of the BIA and the following provisions of the Ontario Labour Relations Act, 1995 dealing with the jurisdiction of the Ontario Labour Relations Board (OLRB) to determine whether someone (*i.e.* a receiver or anyone else) is a successor employer:

> 69(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.
>
> . . . . .
>
> 69(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.
>
> . . . . .
>
> 114(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Ground J. then made a careful analysis of the law, including consideration and application of the decision of the Supreme Court of Canada in *General Motors of Canada Ltd. v. City National Leasing Ltd.*[34] with respect to the issue of reconciling provisions of the federal BIA and the provincial (Ontario) Labour Relations Act which are both "in pith and substance *intra vires* to their respective legislatures".[35] That is, Ground J. clearly held that the provisions of the order insulating the receiver from attacks based on alleged

34. [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255, 24 C.P.R. (3d) 417.
35. *Supra*, footnote 33, at p. 233.

successor employer statutes were validly made pursuant to s. 47 of the BIA.

Ground J. then considered a decision of Farley J.[36] with respect to whether a receiver could be a successor employer before concluding that:

> to determine whether in any particular instance . . . a receiver should be deemed to be a "successor employer" for labour and employment law purposes requires an analysis of the role . . . the receiver is playing and a determination of whether, in essence . . . the receiver is acting qua realizor of assets or is acting qua employer. In the [*TCT Logistics*] case . . . where KPMG operated the warehousing business for less than four months and was extensively engaged during that four-month period in canvassing the market and seeking purchasers for the . . . business as a going concern, there can be no doubt that KPMG was acting [only] qua realizor of assets.[37]

As such, Ground J. upheld the validity of the provisions protecting the receiver from liability as a successor employer, although he amended them to provide that the receiver could not be deemed to be a successor employer so long as it acted only as a realizer of the assets of the debtor and not as an employer operating the business.[38]

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36. *Royal Crest Lifecare Group Inc. (Re)*, 2003 CarswellOnt 683, 40 C.B.R. (4th) 146, 2003 C.L.L.C. ¶220-046 (Ont. S.C.), affd 181 O.A.C. 115, 46 C.B.R. (4th) 126, 2004 C.L.L.C. ¶220-014 *sub nom. CUPE v. Ernst & Young Inc. (as trustee for Royal Crest Lifecare Group Inc.)* (C.A.), leave to appeal to S.C.C. refused 198 O.A.C. 401*n*.

37. *Supra*, footnote 35, at p. 238.

38. The approach taken by Farley J. in *Royal Crest Lifecare Group (Re)*, *supra*, footnote 36, and by Ground J. in *TCT Logistics*, *supra*, footnote 33, was not used by the Ontario Labour Relations Board in the case of *GCIU, Local 500M v. H & S Reliance Ltd.* (1998), 8 C.B.R. (4th) 5, 99 C.L.L.C. ¶220-029 *sub nom. Doane Raymond Ltd. and GCIU, Loc. 500M (Re)*, 49 C.L.R.B.R. (2d) 53 *sub nom. H & S Reliance Ltd. and GCIU, Loc. 500M (Re)* (O.L.R.B.). In that case Doane Raymond Limited was privately appointed as the receiver of H & S Reliance Limited on June 16, 1997, pursuant to the powers contained in, *inter alia*, a general security agreement granted in favour of Royal Bank. Doane Raymond met with the employees at the outset of the receivership and explained that it "was attempting to sell the business as a going concern" and that the business would keep functioning in the meantime. That effort continued for only a few weeks – until July 4, 1997, at which time "the employees of H & S Reliance were informed that a sale as a going concern would not take place". Doane Raymond ceased operations at that time and "proceeded to liquidate" the H & S Reliance assets with the continued assistance of only a "skeleton staff".

The OLRB held that Doane Raymond was bound by the collective agreement by virtue of being a successor employer. In conclusion, the OLRB went back to some of the thinking in the case law referred to in footnote 17, *supra*, and held (at pp. 23-24):

> The scheme of section 69 of the *Labour Relations Act, 1995* contemplates that if an entity assumes real and substantial control of a business, or a part of it, in which a union holds bargaining rights those bargaining rights will be maintained. Doane

In short, Ground J.'s decision seemingly represented a sensible and legally impeccable statement as to the basis upon which courts may legitimately protect receivers from attacks by unions during a relatively brief period when the receiver is trying "keep the lights on" — and keep the employees employed — while it tries to market the business as a going concern in order to see if a buyer can be found who will continue the business, and perhaps offer employment to the employees, on a long-term basis.[39]

As part of his decision, Ground J. also declined to lift the stay against proceedings against the receiver and to grant leave to the union to commence proceedings against the receiver before the Ontario Labour Relations Board.

2. The Court of Appeal Decision

The Ontario Court of Appeal held[40] that the provisions of the *TCT Logistics* order that protected the receiver from liability as a successor employer were invalid. Feldman J.A. held that only the OLRB has jurisdiction to determine the issue of whether a receiver is a successor employer.

However, Feldman J.A. also held that the Ontario Superior Court retains a critical gatekeeper function through its jurisdiction to lift the stay so as to grant leave (or to deny leave) to a union to bring an application before the OLRB to determine the issue:[41]

Raymond assumed that control in every meaningful sense, nothing was left to H & S Reliance. The employees, furthermore, were performing the same work the day after the receivership as they were the day before. The same business continued for the two weeks that Doane Raymond sought to sell it. It is consistent with the scheme of the Act and the long history of Board jurisprudence to find that Doane Raymond is a successor employer in these circumstances.

39. It is to be acknowledged that one of peculiar facts with respect to the sale of the TCT warehouse business was that some, but not all, of the unionized employees formerly working at the Toronto TCT warehouse were hired by the purchaser from the receiver. These hirings were not in accordance with the union agreement as to seniority rights. Certainly, one can understand why that chain of events would have angered the union and might well serve as the basis for a successful application before the Labour Board seeking an order declaring the *purchaser* to be a successor employer. However, that does not seem to justify an attack on the receiver alleging that it was a successor employer "all along".

40. (2004), 48 C.B.R. (4th) 256, 238 D.L.R. (4th) 677 *sub nom. GMAC Commercial Credit Corp. v. TCT Logistics Inc.*, 71 O.R. (3d) 54 *sub nom. GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.* (C.A.).

41. *Ibid.*, at p. 280.

> 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, thereby save as many jobs as possible, it will make sense for the court [*i.e.* the Ontario Superior Court] to deny leave, particularly where the OLRB will, if appropriate, determine that the purchaser is a successor employer, obliged to carry out the collective agreement.

Based on that proposition, it seemed possible for a court appointed receiver to avoid successor employer liability in "the right case". Of course, however, Feldman J.A.'s decision left a level of uncertainty surrounding the receivership process.

Feldman J.A. went on to state that the Superior Court "will be positioned to assist"[42] if a consensual resolution cannot be reached between the receiver and the employees in advance. Of course, time is always the enemy in situations like these. There simply may not be enough time to pursue an agreement with the union in advance, and then also pursue some kind of court-supervised agreement/ order that would deal with the matter. Also, the history of agreements between receivers and unions has been a troubled one. In one prominent case,[43] the receiver and the union reached an agreement with respect to certain limited payments to be made by a receiver of an insolvent company with serious deficits in its pension plan. It seemed clear that the spirit and intent of this agreement was to limit the receiver's overall exposure with respect to pension deficits. However, in spite of this agreement, when an insolvency firm was appointed to wind up the pension plan, they successfully advanced a claim to hold the receiver fully liable as an "employer" for purposes of responsibility for the pension shortfalls.

Speaking for the majority in the Court of Appeal, Feldman J.A. also held that the standard for lifting the stay (so as, for example, to grant leave to a union to apply to the Labour Relations Board for a ruling on successor employer status) should be higher than the relatively low threshold test laid out by the Ontario Court of Appeal in an earlier 1993 bankruptcy case, *Mancini Estate (Trustee of) v.*

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42. *Ibid.*, at p. 281

43. *St. Mary's Paper Inc. (Re)* (1994), 26 C.B.R. (3d) 273, 116 D.L.R. (4th) 448, 19 O.R. (3d) 163 (C.A.), affd 131 D.L.R. (4th) 606, [1996] 1 S.C.R. 3, 96 O.A.C. 321. One practice that developed in the wake of the *St. Mary's* decision was to insert provisions in orders appointing an interim receiver which, among other things, prohibited the interim receiver from making any pension plan payments (without a specific further court order to that effect). This practice was considered, and approved of, by the courts in the *Royal Oak* case. See *Royal Oak Mines Inc. (Re)* (1999), 23 C.C.P.B. 196, 14 C.B.R. (4th) 276 (Ont. S.C.J.), affd 27 C.C.P.B. 163, 143 O.A.C. 75 (C.A.).

Falconi.[44] In the *Mancini* case, the court held that the standard for granting leave is simply whether the evidence discloses a *prima facie* case. The court in *Mancini* also held that leave should not be granted if the action is frivolous or vexatious.

In the *TCT Logistics* case, Feldman J.A. held, for the majority, that the *Mancini* test represented too low a threshold when the proposed proceedings involved successor employer applications. In her view, an approach was required that took more account of the impact of such litigation on the insolvency process. Feldman J.A.'s more stringent test added a requirement to consider factors such as:

- the complexity of the receivership
- the availability of suitable purchasers
- the potential duration of the receiver's operation of the business pending a sale
- any arrangements the receiver had made with the union to accommodate the employees
- the likelihood that a subsequent purchaser would be declared a successor employer bound by the obligations under the collective agreement
- the timeliness of the Labour Board hearing relative to the receiver's temporary occupation and ultimate sale of the business

3. The Supreme Court of Canada Decision

The Supreme Court of Canada decision in the *TCT Logistics* case was released in August 2006.

The Supreme Court ruled, rather succinctly, that the Court of Appeal was right to hold that a bankruptcy judge cannot determine successor rights issues; as such, the Supreme Court upheld the decision by the Court of Appeal to strike the clause in the initial appointment order which protected the receiver from successor employer liability.

Abella J., for the majority, held that s. 47 of the BIA was not as wide in scope as many of us had felt that it was. She held that the provisions of s. 47

> though sufficiently flexible to authorize a wide range of conduct [by a receiver] dealing with the taking, management and eventual disposition of the debtor's property, are not open-ended [and do] not . . . confer authority on the bankruptcy

44. 1993 CarswellOnt 1861, 61 O.A.C. 332 (C.A.).

court to make unilateral declarations about the rights of third parties affected by other statutory schemes.[45]

One could comment that if those rights of such third parties cannot be suspended unilaterally, then all of the wind is taken out of the sails of the first part of her sentence. That is, on a practical level, if those very third party rights cannot be so affected in a way which many of us thought that s. 47 clearly allowed, then the ability of the receiver to "take, manage and eventually dispose of" the property in question will be effectively constrained to the point where the court cannot authorize anything that could really be described as a "wide range of conduct" in addressing the receivership.

Abella J. held that s. 47 needed to be made more "explicit"[46] in order to support the making of a receivership appointment order of the type originally made in *TCT Logistics*.

Abella J. further went on to find that Feldman J.A. had prescribed too onerous a test for whether the stay should be lifted to seek a determination of successor employer status at the Labour Board, holding that the relatively low level test set out in the *Mancini* case was suitable even for an issue such as this one.

IV. CONCLUDING OBSERVATIONS — WHERE DO WE GO FROM HERE?

There is a palpable degree of angst and uncertainty in the insolvency community in the wake of the Supreme Court of Canada decision in *TCT Logistics*.

Certainly, it is true that *TCT Logistics* signals the end of the ability of Canadian courts to insulate receivers from successor liability status through a combination of the stay mechanism and use of the seemingly open-ended provisions of s. 47 of the BIA to craft customized terms for an appointment order. Obviously, I agree with the view of the scope of s. 47 expressed by Ground J. at the trial level in the *TCT Logistics* case; however, that view did not prevail in the Supreme Court of Canada and the law is now settled in this area. One hopes that Parliament will choose to act on Abella J.'s suggestion to provide for more explicit statutory language so as to make it crystal clear that such orders can validly be given under s. 47.[47]

45. *Supra*, footnote 4, at para. 45.
46. *Ibid.*, at para. 51.
47. Of course, that issue raises the topic of the status of bankruptcy and insolvency law reform. Bill C-55 (An Act to establish the Wage Earner Protection Program Act, to

Some practitioners may also have underestimated the potential negative consequences of the *TCT Logistics* decision, confining their criticisms to the implications of the decision for situations involving a unionized work force. This position has been expressed in statements to the effect that "the *TCT Logistics* case represents the end of any attempts that will ever be made in Canada to save jobs at 'union shops'".[48] Certainly, the decision does contain many references to the collective agreements negotiated by unions and the protections that unions offer to employees. For example, Abella J. stated, in part:[49]

> To impose a higher . . . threshold [for lifting the stay to proceed with a Labour Board hearing as to successor employer status] when it is a labour board issue is to read into the *Bankruptcy and Insolvency Act* a lower tolerance for the rights of employees represented by unions than for other creditors. I see nothing in the Act that suggests this dichotomy.

However, it seems that the court's decision will have the same effect where the workforce is *not* unionized. In other words, the issue of whether a receiver will be held to be the successor employer of an insolvent company with non-unionized employees could be just as important (and costly) an issue as it is when a company has unionized employees.[50]

A number of questions are also left unanswered by the *TCT Logistics* decision. They include the full extent to which s. 14.06 of

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amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts — and which is now known as S.C. 2005, Chapter 47) received Royal Assent on November 25, 2005. However, it has not fully come into force and it is not known when it might come into force. In short, the legislation is in a state of limbo. Certainly, in its current form, it does not attempt to address the need that is now present for even greater expansion of the terms of s. 47 of the BIA.

48. Again, of course, what all of this case law amounts to is that while the *TCT Logistics* case may in and of itself have represented a win for unionized labour, ultimately the decision may well be detrimental to employees everywhere, particularly in the short term. Plainly, this decision now makes it much harder to save jobs of an insolvent company. Certainly, it seems more likely that in some situations secured creditors will proceed with pure liquidations (which, of course, entail the abrupt termination of employment) rather than attempt to save the jobs for a brief period of time while a potential purchaser is sought, which, again, has long been the preferred approach in Canada.

49. *Supra*, footnote 4, at para. 71.

50. Very broadly speaking, in Ontario, the Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, regulates unionized work environments and the Employment Standards Act, 2000, S.O. 2000, c. 41, regulates both unionized and non-unionized work environments. Both statutes contain successor employer provisions, which are expressed in similar terms.

the BIA may be used to protect receivers. The Supreme Court did not fully consider that section in *TCT Logistics* and it may provide an answer when the matter is ultimately heard by the Labour Relations Board.[51] It should also be noted that Bill C-55 (now S.C. 2005, Chapter 47[52]) includes a proposal to amend s. 14.06 by adding the following provisions:

> (1.2) Despite anything in any federal or provincial law, if a trustee carries on in that position the business of the debtor or continues the employment of the

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As a result, the costs associated with the handling of an insolvent company with 150 non-unionized employees might be just as significant as those associated with a company in a similar business with 150 unionized employees. Obviously, the presence of the union makes it easier for the unionized employees to prosecute or advance their claims. However, if the non-unionized employees were to organize themselves and, for example, retain a single lawyer to advance their claim, there is absolutely no reason that they could not do so — and that claim could include an attempt to have a receiver declared to be a successor employer.

51. In an interesting article on the *TCT Logistics* case, Ontario Bar Association, "GMAC Commercial Credit Corporation – Canada v. TCT Logistics Inc.", *Insolvency News*, vol. 22, No. 1 (October 2006) at p. 1, Fred Myers, who was counsel for KPMG Inc. in the *TCT Logistics* case, notes some important points concerning the details of the case, including with respect to s. 14.06 of the BIA. First, Mr. Myers notes that at the Court of Appeal level, the formal order of the Court of Appeal recites, in part, that "the parties have agreed that . . . 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". Query whether that really amounts to a concession by the union that they would not ever try to establish that the receiver was liable for termination and severance pay calculated with reference to the pre-receivership employment of the employees?

    Mr. Myers goes on to say that the Supreme Court of Canada "did not say that it was granting the union leave to seek to hold the receiver liable for termination and severance pay calculated with reference to pre-receivership employment of the employees by TCT" (at p. 3). One way to interpret the matter is that a union may argue — in the *TCT Logistics* case or in another case — that if a receiver employs a group of employees *after* its appointment or pursuant to its appointment order, then, as a result of that "post-appointment act" it becomes liable for responsibility to the employees for termination and severance pay calculable by reference to both the period before and after the appointment of the receiver and therefore, as such, arguably s. 14.06 is not determinative of the matter.

    Mr. Myers also indicates that Abella J. seemingly recognized that s. 14.06 is a strong barrier to claims by unions seeking to hold receivers liable for obligations relating to the pre-appointment period. Accordingly, Mr. Myers comes to this "bullish" conclusion concerning the narrowness of the scope of the Supreme Court of Canada's decision in the quote in the preceding paragraph of this footnote. Again, I question whether the union, or anyone else, is going to take s. 14.06 as representing a complete answer to this issue in the *TCT Logistics* case or certainly in any other case?

52. See footnote 47.

> 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 or pay an amount if the claim is in relation to a debt or liability, present or future, to which the debtor is subject on the day on which the trustee is appointed.

Unfortunately, this language represents only a modest improvement over the existing provisions of that section. Again, I do not expect that a union would consider this new language as barring claims against a receiver for successor liability obligations. In plain terms, I think a union would argue that if the receiver has continued the employment relationship after the receiver's appointment, then this new wording, as pleasing as it may sound, is of limited relevance. The new wording refers to claims "to which the debtor is subject o*n the day on which the trustee* (and, in this context, the word "trustee" includes a receiver) *is appointed*" (emphasis added). I would therefore expect the union to argue that where the employment continues after the date of appointment, the subject-matter of the dispute relates to the post-appointment employment relationship, despite the fact that employment may have *begun* before the appointment. That is, where a receiver terminates, say, 50 employees, seven weeks after the receiver's appointment, the union may be expected to argue that:

> (i) The subject matter of the claim is the employment of these workers from the date on which the employment began (admittedly, a "pre-appointment" date) up to and including the date of termination (which is certainly "post appointment").
>
> (ii) The subject matter of the claim cannot be said to be "just" a claim that was wholly in existence at the date of the receivership because it did not really crystallize until seven weeks later, at the date of termination, and it cannot be quantified without reference to that later event.

In any event, Bill C-55 is not yet law, so at this point, it is necessary to go back to a careful consideration of the provisions of s. 69 of the Ontario Labour Relations Act[53] and the associated legislation dealing with the circumstances under which a party assumes successor employer status. Among other things, as referred to above, that section focuses on a "sale" of a business and, in the final analysis, the court will have to decide whether the appointment of a receiver involves such a sale.[54]

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53. *Supra*, footnote 50.
54. Indeed, to return to the negative repercussions of the *TCT Logistics* case for a moment, some practitioners have raised the question whether a receiver could be liable for

In the circumstances, it seems that secured creditors and other stakeholders will continue to do their best to seek ways to protect the going concern value of businesses — and that will include efforts to keep employees employed during a realization process. After *TCT Logistics*, some greater degree of creativity will be necessary. Without limitation, perhaps secured creditors will be more willing to support sales of a business and/or a liquidation that occur under the protection of the Companies' Creditors Arrangement Act[55] (CCAA) or under the commercial proposal provisions of the BIA. Of

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successor employer liability under a collective agreement (or otherwise) even in a pure liquidation scenario. Again, the words of s. 69 of the Labour Relations Act just do not seem to support such a possibility. It would seem that what is really needed to ground a finding of successor employer status is the finding that there has been a transaction whereby the ongoing business was acquired. On that analysis, which seems solidly based in common sense, one would question whether even the original employer would ever trigger successor employer obligations (*i.e.* even where there is no receivership of any kind) merely by proceeding with a liquidation. That result seems unlikely — unless, perhaps, someone actually bought the business assets through that liquidation and immediately began carrying on the business as a going concern in the way that it had been carried on just before the liquidation.

In the *H & S Reliance* case, *supra*, footnote 38, at para. 19, the OLRB again picked up on some of the thinking in the labour relations case law referred to earlier (see footnote 17, *supra*). The OLRB held that in this context the definition of "sells" (or "sale") is "expansive and has been applied to a wide variety of factual constellations. It potentially encompasses any transaction which results in a change in entitlement to possession and control of a business, or part of one, but does not require a change in legal title". One may note the contrast between this expansive reading of the Labour Relations Act and the very restrictive reading of s. 47 of the BIA by the Supreme Court of Canada in the *TCT Logistics* case.

In this regard, I also note the following statement in by George W. Adams in *Canadian Labour Law* (Aurora, Canada Law Book, 1993) at para. 8.230:

> *An application by a trade union for a successorship finding* can be brought *against a receiver* although it *may be premature* to do so *until the business is transferred as a going concern* through the receiver to a purchaser. *In most instances,* the period of receivership is considered a continuation of the old employment relationship and the *successorship issue arises upon the sale by the receiver.* Labour relations boards have drawn a distinction between a court-appointed receiver and the instrument-appointed receiver, though it has been suggested *that boards should look* beyond this commercial characterization *to analyze the real relationship between the parties.* (Emphasis added)

This view seems solidly based. In the 1979 *United Brotherhood of Carpenters and Joiners* case, *supra*, footnote 21, the OLRB described an application for a finding of successor employer liability on a receiver as premature in much the same terms. One hopes this view will be carefully considered in the future as these issues may come to be heard by labour relations boards after the Supreme Court of Canada decision in the *TCT Logistics* case.

55. R.S.C. 1985, c. C-36.

course, that approach is only an option when the lender still trusts the management of the debtor on a fundamental level. Where that management has been at the helm as the debtor moved from solvency to insolvency, some or all of that trust may have been lost. It may be possible, in circumstances where the secured creditor no longer trusts the debtor's management, to introduce a chief restructuring officer or some other skilled professional to manage the company during a liquidation supervised by the court pursuant to the CCAA.

However, even where the CCAA can be used, the cost of that approach will likely be much higher than was the case under the old receivership approach. Once again, it seems that the employees and other smaller creditors will lose in relative terms.

Also, it seems clear that receiverships will continue even after *TCT Logistics*.[56] Indeed, in receiverships involving major production of goods, extending over many months, careful consideration is typically given to the need to make termination and severance payments and any other amounts called for under applicable collective agreements and/or common law. In those situations, such payments may be treated as a cost of the receivership.[57]

In conclusion, the 2006 decision of the Supreme Court of Canada in the *TCT Logistics* case no more represents the end of the issue of how to deal with preserving going concern values of a business and the closely associated issue of maintaining employees in their positions than did the introduction of the expanded language in s. 47 of the BIA in the early 1990s. Indeed, that section was given a very narrow reading, to say the least, by the Supreme Court of Canada in *TCT Logistics*. All of the stakeholders of insolvent businesses will need to continue to do their best to try to preserve jobs as long as possible in the context of trying to preserve value for everyone.

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56. Statistics from the Office of the Superintendent of Bankruptcy Canada show that over thirty (30) private and court appointed receiverships were initiated in the month after the delivery of the Supreme Court of Canada decision in the *TCT Logistics* case in August of 2006. Presumably, some effort was made at the outset of those receiverships to quantify the exposure that might apply should the receiver in question be found to be a successor employer.

57. In those types of situations an effort is also usually made to find a buyer for the business as a going concern and liquidation is only pursued after those efforts are abandoned and the need to complete any production requirements has been completed — again, an overall process which can take months to complete.