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• BROAD DISCLAIMERS IN REPORTS TO COURT NO LONGER ACCEPTED •

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Contributor

For the past several months, judges presiding over the Ontario Superior Court of Justice (Commercial List) (the "Court") have increasingly refused to accept broad disclaimers contained in reports to the Court filed by receivers, trustees, monitors, and other Court-appointed officers ("Officers").

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Until the recent judicial resistance, it was commonplace for reports to include comprehensive disclaimers in favour of Officers. Although the language of the disclaimers varied, the common thread running through them was to renounce any liability and responsibility related to the contents of the report and to deny anyone (including, in some cases, the Court itself) from relying on the report. Essentially, Officers were providing hollow evidence to the Court while concurrently requesting that the Court base its decision entirely or partially on the evidence contained in the Officers' reports. A common example of a broadly worded disclaimer is:

> The Officer has relied exclusively upon the financial records and information provided by the debtor corporation and the other information provided by management, appraisers, accounts, auditors and advisors. The Officer has not independently reviewed or verified such information. The Officer assumes no responsibility or liability for any loss, damage or other consequence occasioned by or caused to any person or entity as a result of the circulation, publication, reproduction or use of or reliance upon this report. Any use that any person, entity or Court makes of this report, or any reliance upon or a decision made based upon this report, is at such person's, entity's or Court's exclusive risk.

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Judges presiding over the Court have recently begun to indicate their disdain of comprehensive disclaimers in Officers' reports. On November 2, 2012,[1] Justice Newbould issued an endorsement that said, in part:

> I have two concerns. The first is paragraph 9 of the Receiver's Report, which means that the Court is not in a position to put any reliance on the Report. This boilerplate lawyer's language is too prevalent and needs to stop.

The views of Newbould J. were later echoed by Justice Brown, who issued a similar endorsement on January 28, 2013,[2] saying, in part:

> I do not accept the disclaimer at paragraph 11 of the Report. If a Receiver files evidence upon which the Court may rely in making a decision—as the Receiver has purported to do in this case—then any party to the proceeding must be able to rely, in the same fashion, on the evidence in assessing its position at the motion. Accordingly, I have proceeded on the basis that the disclaimer in paragraph 11 does not apply to the Court or the parties.

Officers' reasons for adopting these kinds of encyclopaedic disclaimers are relatively clear. They are often appointed over a corporate financial mess and asked to extract reliable financial and other information from lacking books and records. Consequently, Officers are required to rely on incomplete and unverified information in making their reports to the Court. It is no surprise that Officers would want to limit their liability and avoid any unnecessary reliance on the contents of what may be (and often is) incomplete and imperfect information. Besides, many other products of the legal profession often contain similarly broad qualifications and disclaimers to limit the authors' liability.

Officers' desire to include these disclaimers is not only a function of logic. The laws and rules governing certain Officers also compel the use of disclaimers. Rule 46 of the *Bankruptcy and Insolvency General Rules* [*Insolvency Rules*][3] establishes that trustees may transmit information in respect of a bankrupt or debtor only if "the information is subject to a disclaimer of responsibility, or an explanation of the origin of the information". Officers are also bound by their regulatory body, the Canadian Association of Insolvency and Restructuring Professionals ("CAIRP"), to disclaim responsibility for financial information or forward-looking projections where the Officers have not audited or verified the information. In the vast majority of insolvency cases, performing an audit or a financial review that complies with the Financial Reporting and Assurance Standards of Canada is a practical impossibility in light of the time and financial constraints inherent in insolvency proceedings. To that end

- Rule 5 of the CAIRP Rules of Professional Conduct says, in part, that an [Officer] can only transmit information which it has not verified if that information is subject to a disclaimer of responsibility or an explanation of the source of the material;
- Rule 4.01 of the CAIRP Standards of Professional Practice–Plan of Compromise or Arrangement states that the [Officer]'s report should include an appropriate disclaimer/notice to reader that summarizes the scope of the [Officer]'s review, the documents or information on which it relied, and the possible limitation of such information; and
- Rule 6.07 of the CAIRP Standards of Professional Practice—Cash Flow Statement suggests language to incorporate into an Officer's report, which includes a statement that "the [Officer] expresses no opinion or other form of assurance with respect to the accuracy of any financial information presented in its report, or relied upon by it in preparing the report".

Similar standards regarding the use of disclaimers when reporting unverified or forward-looking financial information are also imposed on professional accountants, which many Officers are.

Readership of Officers' reports is not limited to the parties to an insolvency proceeding and their respective counsel. Once filed, reports become part of the public domain. Accordingly, Officers are sensitive to their potential liability to third parties who read and rely on their reports to make decisions outside of the scope of the reports. For instance, a third-party potential investor may review a report authored by a well-recognized accounting firm to support a specific motion in a proceeding and rely on the report's contents to make investment decisions. If these investment decisions were made on the strength of forward-looking information based on incomplete and lacking information obtained from the debtor, the investor's investment decisions may similarly be flawed. Officers, therefore, have an interest in insulating themselves against liability from unintended third parties who misuse their reports.

On the one hand, Officers require certain protections as officers of the Court, as a function of the often broken and unverified information provided to them, and by operation of the rules and legislation that govern them. On the other hand, the Court and the other parties in an insolvency proceeding cannot be expected to make decisions based on evidence that has effectively been hollowed out by a global disclaimer.

Broad disclaimers became so prevalent that the Commercial List Users' Committee formed a Subcommittee on Court Reports (the "Subcommittee") to determine the appropriate scope of disclaimers. The Subcommittee recently presented its memorandum on the topic at a conference in Toronto and provided the following recommendations:

1. Disclaimers should never attempt to deny the Court or any party of the insolvency proceeding from relying on the contents of a report. To do so would be to provide hollow evidence to the Court. Note that the report must be able to be relied upon by all parties throughout the entire proceeding and not limited to a specific motion. That said, judges presiding over the Court have indicated a desire for Officers to be consistent in the form of disclaimers used in reports filed in a particular proceeding, recognizing that disclaimers may need to be tailored for the particular purpose for which the report is prepared.
2. Avoid using broad disclaimers of "all information". Instead, tailor the disclaimer to provide transparency to the Court and the other parties in the proceeding regarding the source and nature of the debtor's information used by the Officer to create the report. In that regard, it is helpful to differentiate the disclaimer language used to reflect different kinds of information contained in the report. Where appropriate, the disclaimer should be qualified by the prefix "unless otherwise stated herein" or similar language to ensure that the disclaimer does not apply to all statements in the report.
3. To reconcile the judicial concerns with the various requirements imposed by law, the Insolvency Rules, and the CAIRP on Officers to include disclaimers in their reports regarding financial information and forward-looking projections, the Subcommittee suggested that Officers identify the source of the information provided to them and comment on any inadequacy of the information. The aim is to achieve transparency in respect of the information used to craft the reports and not to overreach with a broad disclaimer. To that end, the Officer should set out what it has done to compile or review the information contained in its report.

   When the report is being filed as primary evidence, the Officer should, to the extent possible, distinguish between information that has been prepared or provided by others and information that the Officer has prepared or that relate to the Officer's own activities.
4. No disclaimer should apply to actions of an Officer in connection with the insolvency proceeding. This recommendation follows common sense because it would be a peculiar result for an Officer to act with impunity at its own hand. For instance, a report authored in support of a sale process should not contain any disclaimer in respect of the activities of the Officer but can set out the source and nature of the underlying information obtained from the debtor upon which the sale process is predicated.

   Where parties do not cooperate with the Officer in delivering books and records of the debtor, the report should detail the efforts made by the Officer to obtain the missing information and disclose the potential impact that the incomplete information has on the contents of the report and on the Officer's ability to discharge its duties.

5. Consider the purpose of the report and the context within which it is provided to the Court. If the report is the main or only source of information upon which the Court can rely to make findings of fact, then a disclaimer that is not limited to the nature of the debtor's financial information would undermine the ability of the Court to rely on the report.

Certain Officers can also take solace in the legal protections afforded to them regarding liability associated with their reports. Monitors who act in good faith and who take reasonable care in preparing certain reports to court are (by operation of subs. 23(2) of the *Companies' Creditors Arrangement Act*[4]) not liable for loss or damage that is occasioned to any person and results from that person's reliance on the report. Similarly, s. 215 of the *Bankruptcy and Insolvency Act*[5] requires any person seeking to bring an action against a receiver, interim receiver, or trustee with respect to any report made under the *BIA* to first obtain leave of the court (though case law suggests that the test for leave is not very onerous). It is also common practice to seek the Court's approval of Officers' reports and the actions of the Officers set out therein throughout the insolvency proceeding.

On balance, the needs of Officers can harmonize with the needs of the Court if transparency in reports is paramount. If Officers carefully outline the nature and source of the information used in a report and include a tailored notice to the readers regarding the possible inadequacy of that information and the intended use of the report, Officers will be able to comply with the rules and laws that govern their appointments, and the court and other parties to insolvency proceedings will be able to make decisions based on evidence that has not been neutered by overly broad disclaimers. It seems the judicial push to eliminate such overly broad disclaimers from reports may very well provide Officers with sufficient incentive to draft carefully crafted, specific and, above all else, transparent reports going forward.

1 *Morrison Financial Mortgage Corporation v. SBL Kingston Inc.*, Court File No. CV-11-9447-00CL at para. 1 (Ont. S.C.–Commercial List).
2 *HSBC Bank Canada v. Cosmoda Corporation and Cosmoda Ltd.*, Court File No. CV-12-9826-00CL at para. 1 (Ont. S.C.–Commercial List).
3 C.R.C., c. 368.
4 R.S.C. 1985, c. C-36 [*CCAA*].
5 R.S.C. 1985, c. B-3 [*BIA*].

• PROCEED WITH CAUTION: INDEMNIFIED AUDITORS AND UNDERWRITERS LEFT EXPOSED IN INSOLVENCY •

Conor O'Neill and Dylan Chochla
Fasken Martineau DuMoulin LLP

Introduction

On November 23, 2012, the Ontario Court of Appeal (the "Court") released its decision in *Sino-Forest Corp. (Re)* [*Sino-Forest*].[1] The ruling unanimously upheld the lower court's decision that certain indemnity claims by auditors and underwriters against an insolvent debtor fall within the scope of an "equity claim" as defined in the *Companies' Creditors Arrangement Act* [*CCAA*].[2] The Court's decision has widespread implications for any party that may have a contractual right of indemnity against an insolvent corporation—the right that arises, either directly or indirectly, from an "equity interest", as these claims will be subordinated to the debt claims of creditors.

Background

Sino-Forest Corp. ("Sino-Forest")

Sino-Forest is a Canadian public holding company whose subsidiaries owned forestry assets in the People's Republic of China. The common shares of the company were listed on the Toronto Stock Exchange. They have since been delisted. At its peak, the company had a market value of more than $6 billion and raised capital pursuant to multiple debt and equity offerings to the public. As is common in public market transactions, Sino-Forest engaged underwriters and auditors to assist in these offerings.

In 2011, Sino-Forest became the subject of numerous allegations of fraud and misrepresentation. These allegations resulted in the Ontario Securities Commission issuing a cease-trade order against the company. Not surprisingly, Sino-Forest's shareholders commenced multiple class-action lawsuits against (1) the company for fraud and misrepresentation and (2) its auditors and underwriters for, among other things, failing to identify the financial irregularities (the "Shareholder Claims"). Pursuant to their contractual rights of indemnity with Sino-Forest, the auditors and underwriters sought to have Sino-Forest indemnify them against all losses and damages that may be awarded against them in respect of the Shareholder Claims (the "Indemnity Claims").

In March 2012, Sino-Forest applied for and obtained protection from its creditors under the *CCAA*. On June 26, 2012, Sino-Forest sought an order from the Ontario Superior Court of Justice directing that the Shareholder Claims and Indemnity Claims were "equity claims", as defined in s. 2 of the *CCAA*, thus subordinating to the debt claims of its general creditors.

2009 Amendments re "Equity Claims"

In 2009, comprehensive amendments were made to the *CCAA* and the *Bankruptcy and Insolvency Act* [*BIA*],[3] which, among other things, added new provisions dealing with the treatment of equity claims in insolvency proceedings (the "2009 Amendments"). The 2009 Amendments codified the pre-existing practice of subordinating equity claims to the debt claims of creditors.[4] The 2009 Amendments also created a new statutory definition of "equity claim" as follows:

> "equity claim" means <u>a claim that is in respect of any equity interest, including a claim for, among others</u>,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) <u>contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)</u> [emphasis added].[5]

The proper interpretation of the newly defined "equity claim" was the central issue in the *Sino-Forest* decisions summarized below.

The Ontario Superior Court of Justice Decision

Justice Morawetz's ruling in *Sino-Forest Corp.*[6] was the first reported decision to consider the new definition of "equity claims" in the *CCAA* or the *BIA*.

The company's shareholders did not oppose Sino-Forest's motion because the Shareholder Claims were clearly "equity claims" under

para. (d) of the definition (*i.e.*, claims for monetary loss resulting from the ownership, purchase or sale of common shares in Sino-Forest).
On the other hand, the auditors and underwriters opposed the motion on the basis that the Indemnity Claims were not "equity claims". In this regard, they argued, among other things, that the Indemnity Claims were creditor claims arising from their contractual relationship with Sino-Forest and were wholly independent from the Shareholder Claims. From a policy standpoint, they argued that the nature of the relationship between a shareholder and the corporation in which it holds shares is fundamentally different from the relationship existing between a corporation and its advisors and, as a consequence, it is not appropriate to characterize the Indemnity Claims as "equity claims".

In rejecting the arguments put forth by the auditors and underwriters and ruling that the Indemnity Claims were, in fact, "equity claims", Morawetz J. held that the characterization of the Indemnity Claims turned on the characterization of the underlying primary claims.[7] In this case, the underlying primary claims were the Shareholder Claims, which clearly met the definition of an "equity claim".[8] Accordingly, Morawetz J. ruled that the Indemnity Claims that arose by virtue of the underlying Shareholder Claims were also "equity claims" pursuant to para. (e) of the definition. Justice Morawetz. further held that the nature of the claim, rather than the identity of the claimant, was determinative of the issue.[9]

From a policy perspective, Justice Morawetz held that it would be inconsistent to treat the auditors or underwriters as general creditors through a claim for indemnification when the underlying Shareholder Claims were treated as subordinate "equity claims".[10] To do so would permit the shareholders to effectively convert their "equity claim" to a "debt claim" because the proceeds from the Indemnity Claims would flow to the shareholders.[11]

In light of the above-referenced policy considerations and a plain reading of para. (e) of the definition of "equity claim", Morawetz J. concluded that the Indemnity Claims were "equity claims" for the purposes of the *CCAA*.

The Ontario Court of Appeal Decision

The Ontario Court of Appeal upheld Morawetz J.'s ruling that the Indemnity Claims were "equity claims" under the *CCAA*. In rendering its decision, the Court undertook a detailed analysis of the definition of "equity claim" through the application of the principles of statutory interpretation.

The Court noted the expansive language adopted by Parliament when drafting the definition of "equity claim". In this regard, the Court held that the use of the term "in respect of" at para. (e) of the definition is of the widest possible scope, requiring only that there be some link or connection between an "indemnity" at para. (e) and a related claim in paras. (a)–(d).[12] Accordingly, the link between the Shareholder Claims and the Indemnity Claims arising therefrom was sufficient to establish that the Indemnity Claims were "in respect of" a "monetary loss resulting from the ownership of an equity interest" under para. (d) of the definition.[13]

The Court also made reference to the use of the term "including" at the beginning of the definition, which indicates that Parliament intended to include matters that might not otherwise be considered a "claim that is in respect of an equity interest".[14] The Court further noted that Parliament did not specifically restrict the definition of "equity claim" to a claim advanced by holders of an equity interest and the appellants were unable to provide any examples in which a shareholder (or any other holder of an equity interest) might seek an indemnity under s. 2(1)(e) against the debtor in respect of a claim referred to in any of paras. (a)–(d).[15] In light of the above, the Court concluded that Parliament must have intended para (e) to apply to indemnity claims by non-equity interest holders or else para (e) would have been rendered meaningless.

The Court also briefly considered the legislative history of the 2009 Amendments but determined that it provided little insight as to the intended meaning of this provision. Accordingly, given the clear intent of Parliament, as evidenced by the plain wording of the definition, the Court ruled that contractual indemnity claims by non-equity interest holders were properly included within the definition of "equity claim".

Finally, the Court recast Morawetz J.'s statement regarding the policy considerations behind the *CCAA* and held that in enacting the 2009 Amendments, Parliament intended to prevent equity claimants from diminishing the assets of a debtor that are available to general creditors. In the context of a shareholder lawsuit that names both the debtor company and its auditors and underwriters, the Court would frustrate Parliament's intent if it were to allow the auditors and underwriters to assert claims of indemnity against the debtor as general unsecured creditors—the proceeds of which would be payable to the shareholders—thus effectively diminishing the assets of the debtor available for distribution to the general body of creditors.[16]

Implications

The subordinate nature of indemnity claims increases the potential exposure of auditors, underwriters, and possibly other professionals involved in public market transactions; it also limits the value of indemnity provisions in underwriting agreements and other similar advisor retention agreements. Accordingly, it is more important than ever to ensure that such parties have adequate insurance, and it may be necessary to alter file intake processes. It remains to be seen what kind of long-term effect this potential exposure may have on the availability and pricing of relevant insurance policies and ultimately the pricing of market participant services to compensate for any such increases.

As a final note, at trial, Morawetz J. did not characterize the full amount of the claims of the auditors and underwriters as equity claims. He excluded the claims for defence costs on the basis that while it was arguable that they constituted claims for indemnity, they were not necessarily in respect of an equity claim. This determination was not appealed.

[*Editor's note*: **Conor O'Neill** and **Dylan Chochla** are Associates in the Insolvency & Restructuring Group at Fasken Martineau DuMoulin LLP.]

1 *Sino-Forest,* [2012] O.J. No. 5500, 2012 ONCA 816.
2 *CCAA*, R.S.C., 1985, c. C-36.
3 *BIA*, R.S.C., 1985, c. B-3.
4 *CCAA*, *supra* note 2, s. 6(8).
5 *Ibid.*, s. 2(1).
6 *Sino-Forest Corporation (Re)*, [2012] O.J. No. 3627, 2012 ONSC 4377.
7 *Ibid.*, para. 76.
8 *Ibid.*, para. 77.
9 *Ibid.*, para. 79.
10 *Ibid.*, para. 82.
11 *Ibid.* at para. 84.
12 *Sino-Forest*, *supra* note 1, para. 41.
13 *Ibid.*, paras. 42–43.
14 *Ibid.*, para. 44.
15 *Ibid.*, paras. 47–49.
16 *Ibid.*, paras. 55–56.

• *GRANT FOREST PRODUCTS INC.* CLARIFIES PENSION PRIORITY •

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A ruling on September 20, 2013, by Justice Campbell of the Ontario Superior Court of Justice marks an encouraging development for lenders by reducing some of the uncertainty created by the case of *Sun Indalex Finance, LLC v. United Steelworkers* [*Indalex*][1] as to how courts will determine priority as between secured creditors and pension claimants in a proceeding under the *Companies' Creditors Arrangement Act* [*CCAA*].[2] The case of *Grant Forest Products Inc., et al. v. GE Canada Leasing Services Company, et al.* [*Grant Forest*][3] helps to clarify the circumstances under which pension claims will be given priority over secured creditors.

Background

Grant Forest Products Inc. ("GFPI"), along with its subsidiaries, was a company that manufactured strand board from facilities located in Canada and the United States. It administered two defined benefit pension plans that were later wound up.[4] On March 19, 2009, a Petition in Bankruptcy was issued for GFPI, initiated by various senior secured creditors.[5] On June 25, 2009, an Initial Order was made under the *CCAA*, which provided for a stay of proceedings to enable the restructuring of various assets of GFPI.[6] As at the date of the Initial Order, neither of the two relevant defined benefit pension plans were being wound up. An asset sale to Georgia Pacific occurred between 2010 and 2011, before which point there were no deemed trusts in existence.[7]

In August and September 2011, the court granted Orders allowing the initiation of wind-up of the two relevant pension plans. These Orders directed the Monitor to hold back from distribution an amount estimated to be the wind-up deficit for these plans.[8] The issues of priority and deemed trust arose between the Plan Administrator (PricewaterhouseCoopers) and the Second Lien Creditor (West Face Capital) in connection with this holdback amount. A further issue arose as to whether the Stay of Proceedings should be lifted to allow West Face Capital, as Second Lien Lender, to proceed with the outstanding Petition in Bankruptcy and seek a Bankruptcy Order.

The position of the Pension Administrator was that a deemed trust over the funds has arisen pursuant to the *Pension Benefits Act* (Ontario) [*PBA*][9] and that the pension claim resultantly had priority over the Second Lien Creditor.[10] In addition, the Pension Administrator argued that the motion to lift the stay of proceedings represented an attempt to be excused from an obligation to make special pension payments.[11] Justice Campbell disagreed with this position, holding that GFPI was not obligated to make the special wind-up payments.[12]

A Brief Note on *Indalex*

In the case of *Re. Indalex*,[13] the Supreme Court of Canada held that upon wind-up of a pension plan, the *PBA* statutory deemed trust applies not only to the employer's normal cost and special contributions to the plan prior to the wind-up date but also to the entire wind-up deficiency. This ruling was limited to a plan that had been terminated and not a plan whose wind-up was not completed as at the date of the company's asset sale transaction; the Supreme Court found that the priority afforded to such claims arises only when a plan is wound up.

A question also arose as to the priority of a deemed trust. The Supreme Court held that a *CCAA* filing does not alter priorities but that it does allow a judge to issue orders that can have the effect of altering priorities. The expansion of the deemed trust to include the wind-up deficiency was seen to have a potentially significant effect on the claims ranking ahead of secured creditors. As a result, lenders, pension administrators, and companies contemplating secured transactions or facing financial distress have waited for post-*Indalex* decisions to clarify the implications of this case.

The Decision

In deciding in favour of the Second Lien Creditor, the court discussed at length the recent Supreme Court of Canada decision in *Indalex*.[14] Justice Campbell's reasons relating to the deemed trust argument focused on two principal issues discussed below. Justice Campbell also ordered that the stay be lifted so that West Face Capital could proceed with the outstanding Petition in Bankruptcy and seek a Bankruptcy Order.[15]

The Timing of the Plan Wind-Up

Of primary importance within Campbell J.'s decision was the fact that the two relevant pension plans had not begun wind-up at the time of the Initial Order. Justice Campbell held that "[t]he deemed trust that arises upon wind up prevails when the wind up occurs before insolvency as opposed to the position that arises when wind up arises after the granting of an Initial Order".[16] Because on the fact that wind-up had not commenced at the time of the Initial Order, there was no deemed trust.

The Language in the Order

The Initial Order allowed for payments of pension contributions but did not require these. The Initial Order, cited in Campbell J.'s reasons, said:

> [5] THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order;
>
> (a) all outstanding and future wages, salaries, employee benefits and pension contributions, …[17]

Justice Campbell held, "given the uncertainty in this area of legal decision together with the provisions of paragraph 5 of the Initial Order that GFPI was not under an obligation to make the special wind up payments."[18] The language in the Initial Order was a primary factor in coming to this conclusion.

Discussion

The case of *Grant Forest* suggests that if a pension plan is wound up pre-*CCAA*, the deemed trust will have priority over lenders. The caveat is that if the lenders are in a position to commence bankruptcy proceedings under the *Bankruptcy and Insolvency Act* [*BIA*],[19] the deemed trust could be defeated. Post-*CCAA*, however, Campbell J.'s statement that the deemed trust arises upon wind-up pre-insolvency, "as opposed to"[20] post-insolvency, suggests that a deemed trust that arises after the commencement of a *CCAA* proceeding will not be effective.

In addition, the importance placed on the language in the Initial Order in this case suggests that there may be room for pension administrators to challenge this language in the future. Justice Campbell framed this issue as one of federal paramountcy, suggesting that permitting non-payment in the Initial Order (under a federal statute) superseded the provincial *PBA*'s requirement to pay. Justice Campbell held that the Initial Order, "permitted, but did not require the Applicant to pay",[21] and that "provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime applies".[22] The combination of the wording of the Initial Order and the paramountcy argument seems to have carried the day.[23] This may mean that changing the language used in a typical initial order could result in a different conclusion.

A few more points should be noted regarding the decision in *Grant Forest*. The first relates to the earlier case of *Indalex*. Justice Campbell highlighted several factual distinctions between *Grant Forest* and *Indalex*, including the timing of the wind-up, the lack of debtor-in-possession financing in *Grant Forest*, and the wording of the respective Initial Orders. This is one indication that Campbell J. may have confined his decision to the facts of this case. The fact-specific nature of the decision is further visible through Campbell J.'s discussion of the steps that could have been taken by the Pension Administrator and that were not, including objecting to the wording of the Initial Order and seeking to deal with the priority dispute at the time of the sale approval; Campbell J. noted that the sale approval order freezes priorities, "absent specific direction otherwise".[24] This leaves open the possibility that a Pension Administrator in a future proceeding could seek such directions and the outcome could be different.

It should also be noted that the deemed trust issue is not completely clear after the decision in *Grant Forest*. Specifically, Campbell J. assumed that in bankruptcy, a deemed trust priority issue would be eliminated; he referred to s. 67 of the *BIA* as a "problem" in that there is a flip of priorities.[25] This, however, has not been laid out explicitly in the statute or related case law. Moreover, the conclusions both that the deemed trust did not gain priority under the *CCAA* post-insolvency (and could not arise because of the wording of the Initial Order and the paramountcy issue) and that the move to bankruptcy should be permitted so that West Face did not lose its priority seem inconsistent; if there had been no priority, the move to bankruptcy should not have been necessary. This remains an outstanding issue.

Conclusion

The decision in *Grant Forest* should provide some comfort to lenders in the context of a *CCAA* proceeding. The decision represents a clear message that an application to move to bankruptcy from the *CCAA* is permissible and could have the effect of defeating the priorities that exist outside of the bankruptcy context. Justice Campbell suggested in his decision that predictability is of primary importance in the *CCAA* context, and his decision, though not determinative of the deemed trust issue, does move one step closer with respect to lending.

[*Editor's note*: **Lily Coodin** is an associate in the Restructuring and Insolvency Group at Torys LLP.]

1 [2013] S.C.J. No. 6, 2013 SCC 6.
2 R.S.C. 1985, c. C-36.
3 [2013] O.J. No. 4599, 2013 ONSC 5933. It should be noted that this decision is recent and may be appealed.
4 *Ibid.*, para. 8.
5 *Ibid.*, para. 5.
6 *Ibid.*, para. 4.
7 *Ibid.*, para. 11.
8 *Ibid.*, para. 13.
9 R.S.O. 1990, c. P.8.
10 *Grant Forest*, *supra* note 3, para. 18.
11 *Ibid.*, para. 103.
12 *Ibid.*, para. 86.
13 *Indalex*, *supra* note 1.
14 *Ibid.*
15 *Grant Forest*, *supra* note 3, para. 124.
16 *Ibid.*, para. 71.
17 *Ibid.*, para. 54.
18 *Ibid.*, para. 86.
19 *BIA*, R.S.C., 1985, c. B-3.
20 *Grant Forest*, *supra* note 3, para. 71.
21 *Ibid.*, para. 53.
22 *Ibid.*, para. 80.
23 *Ibid.*, para. 86.
24 *Ibid.*, para. 76.
25 *Ibid.*, para. 85.