

COURT FILE NO.: CV-08-7722-00CL**DATE: 20090126****SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)****RE: THE BANK OF NOVA SCOTIA (Applicant) v. HURONIA PRECISION
PLASTICS INC. (Respondent)****BEFORE: MORAWETZ J.****COUNSEL: Sam Rappos, for the Applicant, The Bank of Nova Scotia****A'Amer Ather, for the Canada Revenue Agency****Chris Burr for Maxium Financial Services Inc.****HEARD: NOVEMBER 4, 2008****ENDORSEMENT**

[1] The Bank of Nova Scotia (“BNS”) seeks an order permanently lifting the stay of proceedings provided for in paragraph 9 of the order of September 17, 2008 (the “Appointment Order”) as against Huronia Precision Plastics Inc. (“Huronian”) for the purposes of permitting BNS to bring an application for a bankruptcy order against Huronia pursuant to s.43 of the *Bankruptcy and Insolvency Act* (“BIA”); and authorizing and directing Zeifman Partners Inc. (“Zeifman” or the “Receiver”), the court appointed Receiver of Huronia to consent, on behalf of Huronia, to BNS’s application for a bankruptcy order.

[2] The Canada Revenue Agency (“CRA”) has also brought a motion in which it seeks an order directing the Receiver to pay to CRA immediately, the amount of \$63,164.17; and in the event that this court permits a lifting of the stay to permit BNS to apply for the bankruptcy order, a lifting of the stay to permit CRA to take the necessary steps to protect its priority position.

[3] The Appointment Order was made September 17, 2008. The Receiver subsequently brought a motion returnable September 30, 2008 seeking an order vesting certain equipment in Magna Closures Inc. (“Magna”) and directing that the net proceeds of the sale would stand in the place of the equipment.

[4] The order was granted on September 30, 2008 (the “Vesting Order”) and paragraph 9 of the Vesting Order provides:

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9. THIS COURT ORDERS that notwithstanding paragraph 30 of the Appointment Order, the Receiver shall withhold from the net proceeds of the Purchased Assets the total sum of \$130,000 (the "Holdback") pending resolution of the claim asserted by Canada Revenue Agency ("CRA") respecting possible pre-receivership GST arrears said to be owing by the Debtor (the "GST Claim"). The Receiver shall distribute the Holdback, or any balance thereof after payment to CRA of the amount of the GST Claim to the extent that it is found to attach to the net proceeds in priority to the interest of Maxium and BNS, to Maxium and BNS in accordance with their respective proportionate entitlements to the net proceeds under the terms of the Bill of Sale or as otherwise agreed upon by them, upon the consent of CRA, Maxium and BNS or a further order of this Court. [emphasis added]

[5] Subsequent to the granting of the Vesting Order, CRA informed BNS and Maxium that CRA's claim for GST for the period prior to the Appointment Order was \$63,164.17.

[6] Pursuant to ss.222(1) of the *Excise Tax Act* ("ETA"), persons who have collected GST amounts but have not remitted them to CRA, as and when required to do so by the *ETA*, are deemed to hold those amounts in trust for the Crown.

[7] The one notable exception to the priority granted to the deemed trust is that it is subject to s.222(1.1) of the *ETA*, which provides that s.222(1) does not apply, at or after the time a person becomes bankrupt (within the meaning of the *BIA*), to any amounts that, before that time, were collected or became collectable by the person as or on account of tax under Division II of the *ETA*.

[8] Section 67(2) of the *BIA* provides that all deemed trusts created by federal or provincial legislation for Her Majesty are rendered invalid except those that would be valid in the absence of such legislation and except those set out in s.67(3) of the *BIA*. The deemed trust under the *ETA* is not listed in s.67(3), nor, in my view, is it analogous to the deemed trusts that are set out in that section.

[9] Counsel for BNS submits that it is clear that the *ETA* specifically contemplates that the priority afforded to the Crown under s.222 of the *ETA* can be extinguished and reversed on the occurrence of a bankruptcy. Further, both the *ETA* and the *BIA* recognize that any priority that CRA could potentially have with respect to the Holdback in the amount of the GST Claim would be reversed upon the bankruptcy of Huronia.

[10] CRA submits that it has priority over BNS with respect to the Holdback pursuant to the provisions of the *ETA* and since BNS has acceded to CRA's priority as a result of paragraph 9 of the Vesting Order, BNS should not be permitted to bring an application for a bankruptcy order to disrupt CRA's priority to which it acceded.

[11] Counsel for BNS submits that at no time prior to or after the issuance of the Vesting Order did it accede to the CRA having an interest in the Holdback in the amount of GST Claim in absolute priority to BNS.

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[12] In my view, absent the wording of paragraph 9 of the Vesting Order, BNS would have the ability to reverse the priority of the GST Claim by bringing an application for a bankruptcy order.

[13] The Court of Appeal decision in *Re Ivaco Inc.* [2006] O.J. No. 4152 (C.A.) stands for the proposition that it is not improper to seek a bankruptcy order for the purpose of reversing a statutory priority. In this case, it would be to reverse the priority position of CRA. Further, the timing of BNS's action has no bearing on the validity of the action being sought as there are no such time limitations imposed under s.222(1.1).

[14] It seems to me that the issue to consider is whether paragraph 9 of the Vesting Order operates so as to support the position put forth by CRA. In my view, the paragraph is clear where it provides that the Receiver "shall distribute the Holdback, or any balance thereof, after payment to the CRA of the amount of the GST Claim to the extent that it is found to attach to the net proceeds in priority to the interest of ... [Maxium and BNS]". [emphasis added]

[15] I agree with the submission of counsel to BNS that paragraph 9 reflects that any distribution of the Holdback to CRA is dependent on a determination as to whether the GST Claim attaches to the Holdback in priority to the interest of BNS.

[16] In its factum, counsel to CRA, at paragraph 24 states that the Receiver's obligation to pay the deemed trust portion of the GST was made explicit and that the obligation to pay CRA was not otherwise qualified by any conditions. I disagree. The emphasized portion of paragraph 9 has to be given a common sense interpretation which, in this case, takes into account that, at the time of the issuance of the Vesting Order, there was an outstanding issue with respect to the priority of the interest of Maxium and BNS.

[17] CRA also made the submission that the Receiver had certain obligations and responsibilities as set out in paragraph 9 of the Vesting Order which specifically qualifies the Receiver's rights as set out in the Appointment Order. Counsel for CRA submitted that the relevant portion of the Vesting Order specifically speaks to payment to CRA and, as of the date of the hearing of this motion, with Huronia not being bankrupt, the Receiver is under an obligation to pay CRA the amount of its deemed trust claim. I do not read paragraph 9 in such a way that it supports this submission. At the time of the granting of the Vesting Order, the issue of priority with respect to the interest of Maxium and BNS had not been determined with finality. It follows that the payment obligation to CRA had not been triggered.

[18] Paragraph 9 does not, in my view, direct the Receiver to distribute the Holdback to CRA forthwith upon the CRA providing evidence to the Receiver with respect to the amounts owing by Huronia for the period prior to the issuance of the Appointment Order. If it did, the emphasized words in paragraph 9 would serve no purpose.

[19] Finally, with respect to the request of BNS to lift the stay for the purpose of bringing an application for a bankruptcy order against Huronia and authorizing the Receiver to consent to such application, I am satisfied that the desire for BNS to use the *BIA* to alter priorities is a legitimate reason to seek a bankruptcy (see *Re Ivaco Inc.*) and the timing of the BNS's action has no bearing on the validity of this request.

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[20] Consequently, it follows that the motion of BNS is granted and an order shall issue lifting the stay of proceedings against Huronia for the purpose of permitting BNS to bring the application for bankruptcy order and authorizing the Receiver to consent to such application on behalf of Huronia.

[21] In these circumstances, it also follows that no order is to be made directing the Receiver to make payment to CRA, nor is the stay to be lifted to enable CRA to take steps to protect its position. The motion of CRA is dismissed.

[22] If the parties are unable to agree on costs, brief written submissions, to a maximum of three pages, may be filed within 20 days.


MORAWETZ J

DATE: January 26, 2009