Court File No.: CV-24-00715773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP., AND FINAL BELL CORP.

Applicants

FACTUM OF THE APPLICANTS
(Returnable December 2, 2024)

November 29, 2024

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PART I: OVERVIEW

1. BZAM Ltd. ("**BZAM**"), BZAM Holdings Inc., BZAM Management Inc. ("**BZAM Management**"), BZAM Cannabis Corp., Folium Life Science Inc., 102172093 Saskatchewan Ltd., The Green Organic Dutchman Ltd., Medican Organic Inc. ("**Medican**"), High Road Holding Corp., and Final Bell Corp. doing business as BZAM Labs (each individually, an "**Applicant**", and collectively, the "**Applicants**") are seeking an order (the "**Order**") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), *inter alia*:

(a) extending the stay of proceedings;

(b) authorizing either FTI Consulting Canada Inc. ("**FTI**"), in its capacity as Court-appointed monitor (in such capacity, the "**Monitor**"), or 9430-6347 Québec Inc. ("**9430 Quebec**") to file an assignment in bankruptcy for 9430 Quebec (the "**Bankruptcy Assignment**"), naming FTI as the trustee in bankruptcy;

(c) partially lifting the stay of proceedings with respect to 9430 Quebec, insofar as it may be necessary to permit the Bankruptcy Assignment and commence the proceedings related thereto; and

(d) approving the Seventh Report of the Monitor dated November 29, 2024 (the "**Seventh Report**") and the Monitor's activities therein.

2. The stay extension sought pursuant to the proposed Order will preserve the *status quo* and provide the breathing room required for the Applicants to seek approval of the Stalking Horse Transaction (as defined below) and commence preparations to exit these CCAA Proceedings, all while continuing to operate their business in the ordinary course. Further, by authorizing the Bankruptcy Assignment, the proposed Order allows the Applicants to focus their limited resources

toward these CCAA Proceedings – rather than dedicating additional time and money to an entity that provides no benefit to the Applicants' business or their restructuring efforts.

3. The relief sought in the within motion is in the best interests of the Applicants and their stakeholders, supported by the Monitor and the DIP Lender and appropriate in the circumstances.

PART II: FACTS

4. The facts underlying this motion are more fully set out in the affidavit of Matthew Milich sworn November 25, 2024 (the "**Milich Affidavit**").[1] All capitalized terms used but not defined herein have the meanings ascribed to them in the Milich Affidavit.

A. Background to and Developments in these CCAA Proceedings

5. BZAM is the ultimate parent company to several companies in the cannabis industry in Canada.[2] Through its subsidiaries, its business and operations focus on the production and sale of various cannabis products.[3]

6. Facing significant liquidity issues, the Applicants were granted CCAA protection by an order of the Ontario Superior Court of Justice (Commercial List) on February 28, 2024 (the "**Initial Order**").[4] The Initial Order, among other things, appointed FTI as the Monitor in these CCAA Proceedings and granted an initial stay of proceedings in favour of the Applicants, the Non-Applicant Stay Parties and their respective directors and officers until and including March 8, 2024 (the "**Stay Period**").[5]

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[1] Affidavit of Matthew Milich sworn on November 25, 2024 [Milich Affidavit], Motion Record of the Applicants dated November 25, 2024 at Tab 2 [Motion Record].
[2] Milich Affidavit, *ibid* at para 6, Motion Record at Tab 2.
[3] Milich Affidavit, *ibid*, Motion Record at Tab 2.
[4] Milich Affidavit, *ibid* at para 7, Motion Record at Tab 2.
[5] Milich Affidavit, *ibid* at para 8, Motion Record at Tab 2.

7. On March 8, 2024, the Applicants obtained an amended and restated Initial Order, which, *inter alia*, extended the Stay Period to and including May 25, 2024.[6]

8. In an effort to identify and implement a value-maximizing transaction, the Applicants sought and, on March 8, 2024, obtained an order which, among other things, authorized and approved a sale and investment solicitation process (the "**SISP**"), in which a share subscription agreement (the "**Stalking Horse Purchase Agreement**") between BZAM and 1000816625 Ontario Inc. (the "**Stalking Horse Purchaser**") and the transaction related thereto (the "**Stalking Horse Transaction**") served as the Stalking Horse Bid.[7] Following a determination that none of the bids received by the LOI Deadline constituted Qualified Bids (each as defined under the SISP), the SISP was terminated and the Stalking Horse Transaction was recognized as the successful bid.[8]

9. The Applicants intended to seek approval of the Stalking Horse Purchase Agreement and the Stalking Horse Transaction following the termination of the SISP; however, they have continued to postpone seeking such approval due to unresolved litigation between Final Bell Holdings International Ltd. ("**Final Bell**"), Cortland and the Applicants (as discussed below).[9] As a result, the Stay Period has been extended four times during the pendency of these CCAA Proceedings, including most recently to and including December 2, 2024.[10]

10. On October 15, 2024, the Court granted an Approval and Vesting Order, which among other things, approved the sale of 100% of the issued and outstanding shares of BZAM Management to 1000912353 Ontario Inc. (the "**BMI Transaction**").[11] The BMI Transaction is structured as a reverse-vesting transaction, pursuant to which all the Excluded Assets, the Excluded

[6] Milich Affidavit, *ibid* at para 9, Motion Record at Tab 2.
[7] Milich Affidavit, *ibid* at para 11, Motion Record at Tab 2.
[8] Milich Affidavit, *ibid* at para 13, Motion Record at Tab 2.
[9] Milich Affidavit, *ibid* at para 36, Motion Record at Tab 2.
[10] Milich Affidavit, *ibid* at para 15, Motion Record at Tab 2.
[11] Seventh Report of the Monitor dated November 29, 2024 at para 18 [Monitor's Report].

Contracts and the Excluded Liabilities (each as defined in the Approval and Vesting Order) will be vested out of BZAM Management and into 1001028579 Ontario Inc. ("**ResidualCo**").[12] Following the closing of the BMI Transaction, Wyld Canada Inc., a third-party, will become the ultimate purchaser of BZAM Management through a subsequent transaction outside of these CCAA Proceedings.[13]

11. It is expected that the BMI Transaction will close shortly, at which point ResidualCo will replace BZAM Management as an Applicant in these CCAA Proceedings and the sale proceeds will be distributed to Cortland pursuant to the terms of the Ancillary Order.[14]

B. Final Bell Litigation

12. Final Bell served a notice of motion on March 18, 2024, in support of a rescission claim made in respect of a share exchange agreement entered into between BZAM, Final Bell and Final Bell Canada Inc.[15] Final Bell has subsequently abandoned its rescission claim, and is seeking in the alternative, among other things: (i) equitable damages in lieu of rescission, and (ii) a declaration that such damages are subject to a constructive trust (the "**Amended Claim**").[16]

13. In response to the Amended Claim, Cortland brought a motion seeking a declaration that the claims of Final Bell against the Applicants, including any potential constructive trust claim in relation to the assets of the Applicants or the sale proceeds related thereto, are subordinate to Cortland's secured interest, including its DIP Lender's Charge, in such assets and proceeds (the "**Threshold Motion**").[17]

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[12] Milich Affidavit, *supra* note 1 at para 16, Motion Record at Tab 2.
[13] Monitor's Report, *supra* note 11 at para 19.
[14] Milich Affidavit, *supra* note 1 at para 18, Motion Record at Tab 2.
[15] Milich Affidavit, *ibid* at para 19, Motion Record at Tab 2.
[16] Milich Affidavit, *ibid*, Motion Record at Tab 2.
[17] Milich Affidavit, *ibid* at para 22, Motion Record at Tab 2.

14. Pursuant to subsection 3.13(l) of the DIP Loan, until a decision is rendered in respect of the Threshold Motion and/or the Amended Claim is resolved, the Applicants are unable to proceed with seeking approval of the Stalking Horse Transaction (except with the prior consent of Cortland).[18]

15. As of the date of the Seventh Report, there has been no decision issued in respect of the Threshold Motion.[19]

C. 9430 Quebec's Proposed Assignment into Bankruptcy

16. On or prior to November 11, 2022, Mr. France Boisvert, Mr. Daniel Fontaine (together, the "**Motion Parties**") and Medican, among others, entered into certain agreements (collectively, the "**Purchase Agreements**") whereby Medican agreed to purchase from the Motion Parties all outstanding and issued shares of 9430 Quebec (the "**Share Purchase Transaction**").[20]

17. At the initial hearing, the Applicants obtained creditor protection for 9430 Quebec as a Non-Applicant Stay Party pursuant to the terms of the Initial Order – with the expectation that once the Share Purchase Transaction closed, 9430 Quebec would become an Applicant in these CCAA Proceedings.[21] However, due to certain outstanding conditions, the Share Purchase Transaction never closed and the shares of 9430 Quebec remain in escrow.[22]

18. As part of the Applicants' restructuring efforts, Medican sent a Notice by Debtor Company to Disclaim or Resiliate an Agreement (the "**Notice**") on May 29, 2024 to disclaim or resiliate the

[18] Milich Affidavit, *ibid* at para 37, Motion Record at Tab 2.
[19] Monitor's Report, *supra* note 11 at para 33.
[20] Milich Affidavit, *supra* note 1 at para 26, Motion Record at Tab 2.
[21] Milich Affidavit, *ibid* at para 43, Motion Record at Tab 2.
[22] A condition precedent for 9430 Quebec's release from escrow was the completion of certain Landlord Work (as defined in the Lease Agreement), which was required to be completed to the satisfaction of 9430 Quebec. The Landlord Work included, *inter alia*, the receipt of an occupancy permit. Due to unresolved issues with the septic system, 9430 Quebec never received an occupancy permit from the municipality; Milich Affidavit, *ibid* at paras 26-28, Motion Record at Tab 2.

Purchase Agreements.[23] In response, the Motion Parties served a Notice of Motion on the Applicants (the "**Disclaimer Objection Notice of Motion**") on June 25, 2024, objecting to the Notice.[24]

19. After multiple attempts by the parties to resolve the issues underlying the Disclaimer Objection Notice of Motion, the Applicants, in consultation with the Monitor, determined that it was in the best interest of the Applicants, the Motion Parties and their respective stakeholders to have 9430 Quebec assigned into bankruptcy.[25] Notably, 9430 Quebec has no material assets, management, employees or business operations.[26]

20. The relief sought by the Applicants would expand the powers of the Monitor provided in the ARIO to authorize the Monitor, an experienced Licensed Insolvency Trustee, or 9430 Quebec to take all actions necessary to file an assignment in bankruptcy for 9430 Quebec.[27] The Applicants have agreed to bear all costs associated with such assignment.[28]

21. The Applicants are not aware of any opposition to the proposed Bankruptcy Assignment, including from the Motion Parties.[29]

D. The Stay of Proceedings

22. The Stay Period will expire on December 2, 2024.[30] Pursuant to the proposed Order, the Applicants are seeking to extend the Stay Period to and including January 13, 2025 (the "**Stay Extension**").[31]

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[23] Milich Affidavit, *ibid* at paras 29, Motion Record at Tab 2.
[24] Milich Affidavit, *ibid* at paras 29-31, Motion Record at Tab 2.
[25] Milich Affidavit, *ibid* at para 32, Motion Record at Tab 2.
[26] Milich Affidavit, *ibid* at para 44, Motion Record at Tab 2.
[27] Milich Affidavit, *ibid* at para 45, Motion Record at Tab 2.
[28] Milich Affidavit, *ibid* at 32, Motion Record at Tab 2.
[29] Milich Affidavit, *ibid* at para 33; Motion Record at Tab 2.
[30] Milich Affidavit, *ibid* at para 35, Motion Record at Tab 2.
[31] Milich Affidavit, *ibid*, Motion Record at Tab 2.

23. The Revised Cash Flow Forecast demonstrates that the Applicants will have sufficient liquidity to fund their obligations and the costs of these CCAA Proceedings throughout the Stay Period.[32] The revised cash flow forecast is attached as Appendix "A" to the Seventh Report.[33]

E. The Seventh Report

24. The proposed Order also seeks approval of the Seventh Report and the activities of the Monitor described therein.[34]

PART III: ISSUES

25. The issues to be considered on this motion are whether this Court should:

(a) authorize the Bankruptcy Assignment;

(b) approve the Stay Extension;

(c) lift the stay of proceedings with respect to 9430 Quebec, insofar as it may be necessary to permit the Bankruptcy Assignment; and

(d) approve the Seventh Report.

[32] Milich Affidavit, *ibid* at para 40, Motion Record at Tab 2; Monitor's Report, *supra* note 11 at para 37.
[33] Monitor's Report, *supra* note 11 at Appendix "A".
[34] Milich Affidavit, *supra* note 1 at para 46, Motion Record at Tab 2.

PART IV: LAW AND ANALYSIS

A. The Assignment in Bankruptcy Should be Approved

1. The Powers of the Monitor Should be Extended to Authorize the Bankruptcy Assignment

26. Pursuant to sections 11 and 23(1)(k) of the CCAA, this Court has the authority to expand the powers of the Monitor – including to facilitate the liquidation of debtor companies.[35] Section 11 of the CCAA provides the Court with a broad discretion that should be exercised in furtherance of the remedial objectives of the CCAA, and where it has been demonstrated that: (a) the order sought is appropriate in the circumstances, and (b) the applicant has been acting in good faith and with due diligence.[36] In addition, subsection 23(1)(k) specifically provides that a monitor is empowered to carry out any function in relation to the company that the court may direct.[37]

27. Orders providing for enhanced powers, including to exercise management functions and to bankrupt entities, have become increasingly common in CCAA proceedings.[38] This Court has found these enhanced powers consistent with the non-exhaustive list of duties and functions of a monitor set out in section 23 of the CCAA.[39] The enhanced powers requested in this case will allow the Monitor to file an assignment in bankruptcy for 9430 Quebec, as applicable.

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[35] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 91[*Harte Gold*]; *In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. And 2496750 Ontario Inc.* (October 12, 2023) (Commercial List), CV-23-00693758-00CL (Endorsement) (Kimmel, J) (ONSC) at paras 15-17 [*OTE*]; *Re Nortel Networks Corporation et al*, 2014 ONSC 6973 at para 31 [*Nortel*]; *In the Matter of a Plan of Compromise or Arrangement of Indiva Limited, Indiva Amalco Ltd., Indiva Inc. Vieva Canada Limited, and 2639177* (October 21, 2024) (Commercial List) CV-23-00722044-00CL (Endorsement) (Penny, J) (ONSC) at para 8 [*Indiva*]; *In the Matter of a Plan Of Compromise or Arrangement of Heritage Cannabis Holdings Corp. et al* (June 26, 2024) (Commercial List) CV-24-00717664-00CL (Endorsement) (Kimmel, J) (ONSC) at para 16 [*Heritage Cannabis*]; *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s 11, ; *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 at paras 106, 117-118.

[36] *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 at paras 47-49; *OTE*, *ibid* at para 15; *Canada v. Canada North Group Inc*., 2021 SCC 30 at para 21.

[37] *OTE*, *ibid* at para 15; *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, ss 23(1)(k) [*CCAA*].

[38] *Heritage Cannabis*, *supra* note 35 at para 16; *Nortel*, *supra* note 35 at para 31; *OTE*, *supra* note 35 at para 17; *Indiva*, *supra* note 35 at para 8; *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659 at para 68.

[39] *Heritage Cannabis*, *supra* note 35 at para 16.

28. As a Licensed Insolvency Trustee, the Monitor has the experience and expertise necessary to oversee and effect the bankruptcy of 9430 Quebec.[40] Moreover, since 9430 Quebec has no employees or management, the enhanced powers are reasonable in the circumstances to ensure an orderly liquidation.

29. The Applicants have, and continue to, act in good faith and with due diligence. In order to reach a resolution between the parties, the Applicants have cooperated with the Motion Parties in an attempt to reach a consensual path forward. The Applicants have agreed to pay all costs associated with the proposed Bankruptcy Assignment and take all necessary steps to assist FTI, as the proposed trustee in bankruptcy, to complete the liquidation (if and when the proposed Order is granted).[41]

30. As made very clear by each parties' efforts to disclaim or deny ownership of 9430 Quebec,[42] neither the Motion Parties nor the Applicants will be prejudiced by the Monitor's proposed enhanced powers (if granted). Rather, the Applicants are of the view that the proposed relief is in the best interests of both the Applicants and the Motion Parties, and will help ensure a timely, efficient and final resolution to the issues raised in the Disclaimer Objection Notice of Motion.

2. The Limited Lifting of the Stay Should be Granted

31. As with the imposition of a stay, lifting the stay is a matter of discretion.[43] In determining whether to lift the stay, the Court will consider whether there are sound reasons for doing so consistent with the objectives of the CCAA – including a consideration of the balance of

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[40] Milich Affidavit, *supra* note 1 at para 45, Motion Record at Tab 2.
[41] Milich Affidavit, *ibid* at para 32, Motion Record at Tab 2; Monitor's Report, *ibid* at para 30.
[42] Milich Affidavit, *ibid* at paras 29, 32, 44, Motion Record at Tab 2.
[43] *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, 2015 ONCA 570 at para 99; *Timminco Ltd, Re*, 2014 ONSC 3393 at para 38 [*Timminco*].

convenience, the relative prejudice to the parties, and where relevant, the merits of the proposed action.[44]

32. Despite the CCAA's silence on a debtor's transition into liquidation, the Supreme Court of Canada has found that the breadth of this Court's discretion under the CCAA is sufficient to "construct a bridge" to the BIA and permit the lifting of a stay to file an assignment in bankruptcy.[45] This Court has granted such relief in circumstances where the insolvent entity has no prospect of reorganization, has ceased operations and is without material assets.[46]

33. There is little benefit to upholding the stay against 9430 Quebec and preventing the Monitor or 9430 Quebec from filing the Bankruptcy Assignment. 9430 Quebec is insolvent with no material assets.[47] Its former cultivation and processing license has been revoked by Health Canada upon request and the entity has no employees or management to operate its former business.[48] Additionally, the Monitor has agreed to act as the trustee in bankruptcy.[49]

34. The balance of convenience strongly supports partially lifting the stay to allow the Bankruptcy Assignment. Notwithstanding multiple discussions between the parties, the Applicants and the Motion Parties are effectively at a standstill. Neither party wishes to own 9430 Quebec, nor do the Applicants want to spend their limited resources (or judicial resources) engaging in additional negotiations and/or litigation.[50] The Bankruptcy Assignment provides a sensible and equitable solution without prejudicing the interests of the applicable parties.

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[44] *Timminco*, *ibid* at para 50.
[45] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 80 [*Century Services*]; *Grant Forest*, *supra* note 44 at para 112.
[46] *Grant Forest*, *ibid* at para 111; *Ivaco Inc., Re*, 2006 CarswellOnt 6292 (see Schedule "C" attached hereto) at para 70, 76 [*Ivaco*]; *Century Services*, *ibid* at para 15.
[47] Milich Affidavit, *supra* note 1 at para 44, Motion Record at Tab 2.
[48] Monitor's Report, *supra* note 11 at para 24.
[49] Monitor's Report, *supra* note 11 at para 30.
[50] Milich Affidavit, *supra* note 1 at para 44, Motion Record at Tab 2.

35. As such, it is the Applicants' view that the proposed relief – i.e., the partial lifting of the stay solely to file the Bankruptcy Assignment and participate in the proceedings related thereto – is a practical compromise between the parties, minimally disruptive to these CCAA Proceedings, and reasonable in the circumstances.

B. The Stay of Proceedings Should be Extended

36. The Stay Period is currently set to expire on December 2, 2024.[51] Subsection 11.02(2) of the CCAA expressly authorizes this Court to grant an extension of the stay of proceedings for "any period that the court considers necessary."[52] To grant such an extension, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.[53]

37. An extension of the stay of proceedings will be appropriate where it advances the purposes of the CCAA – which includes enabling the continuation of the applicant's business, facilitating a value maximizing restructuring, and avoiding the social and economic effects of bankruptcy.[54]

38. In this case, the proposed Stay Extension is appropriate in the circumstances given that:

(a) since the granting of the Initial Order, the Applicants have acted in good faith and with due diligence to, among other things, stabilize their business, advance their restructuring efforts, and identify and implement value-maximizing transactions;[55]

(b) despite their best efforts to seek approval of the Stalking Horse Transaction prior to the expiry of the Stay Period, the Applicants have continued to postpone seeking

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[51] Milich Affidavit, *supra* note 1 at para 35, Motion Record at Tab 2.
[52] CCAA, *supra* note 37, s 11.02(2).
[53] CCAA, *ibid* s 11.02(2); *Harte Gold*, *supra* note 35 at para 87.
[54] *Century Services*, *supra* note 46 at para 15; *Target Canada Co. (Re)*, 2015 ONSC 303 at para 8; *Heritage Cannabis*, *supra* note 35 at para 13.
[55] Milich Affidavit, *supra* note 1 at para 39; Motion Record at Tab 2; Monitor's Report, *supra* note 11 at para 40(b).

such approval due to the ongoing uncertainty surrounding the determination of the Amended Claim;[56]

(c) the proposed Stay Extension will afford the Applicants the breathing space and stability required to close the BMI Transaction and address post-closing matters related thereto;[57]

(d) the proposed Stay Extension will allow the Applicants and the Stalking Horse Purchaser to finalize the terms of the amended Stalking Horse Purchase Agreement and, subject to the determination of the Amended Claim, seek approval thereof;[58]

(e) the proposed Stay Extension will allow the Applicants to advance matters towards a termination of these CCAA Proceedings that will allow certain of the Applicants to emerge as going concern entities;[59] and

(f) the Monitor is supportive of the proposed Stay Extension and does not believe that any creditor will be prejudiced by such extension.[60]

39. Taken together, the Applicants submit that the proposed Stay Extension is in the best interests of the Applicants and their stakeholders, is consistent with the purposes of the CCAA, and is appropriate in the circumstances.

C. The Seventh Report Should be Approved

40. It has become a usual practice in CCAA proceedings for a Court-appointed monitor (or an applicant on its behalf) to bring a motion to approve its reports.[61] This Court has recognized a

[56] Milich Affidavit, *ibid* at para 36, Motion Record at Tab 2.
[57] Milich Affidavit, *ibid* at para 38, Motion Record at Tab 2.
[58] Milich Affidavit, *ibid*, Motion Record at Tab 2.
[59] Milich Affidavit, *ibid*, Motion Record at Tab 2.
[60] Milich Affidavit, *ibid* at para 41; Motion Record at Tab 2; Monitor's Report, *supra* note 11 at para 40.
[61] *Target Canada Co. (Re)*, 2015 ONSC 7574 at paras 1-2 [*Target*]; *Laurentian University of Sudbury*, 2022 ONSC 2927 at paras 13-14.

number of policy and practical reasons for the Court to approve a monitor's activities, including that it:

(a) allows the monitor to move forward with next steps in the CCAA proceedings;

(b) brings the monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;

(d) enables the Court to satisfy itself that the monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the monitor.[62]

41. In addition, this Court has advised that the benefit of any approval in respect of a monitor's report and its activities should be limited to the monitor itself and should not extend to the Applicants or other third parties.[63]

42. The Monitor has continued to demonstrate a diligent and good faith performance of its activities in compliance with both the CCAA and the orders of this Court.[64] In light of the aforementioned benefits and the customary restrictions included under the proposed Order to limit the benefit of such approval to only the Monitor, the Applicants submit that it is appropriate in the

[62] *Target*, *ibid* at para 23.
[63] *Target*, *ibid* at para 21; *Nordstrom Canada Retail, Inc.*, 2023 ONSC 4199 at para 22.
[64] Milich Affidavit, *supra* note 1 at para 46; Motion Record at Tab 2; Monitor's Report, *supra* note 11 at para 10.

circumstances for this Court to approve the Seventh Report and the activities of the Monitor described therein.

PART V: RELIEF REQUESTED

43. The Applicants submit that the relief sought on the within motion is appropriate in the circumstances and respectfully request that the proposed form of Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29TH DAY OF NOVEMBER, 2024

Bennett Jones LLP

BENNETT JONES LLP

SCHEDULE A – LIST OF AUTHORITIES

Cases Cited

1. *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10
2. *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2020 QCCA 659
3. *Canada v. Canada North Group Inc.*, 2021 SCC 30
4. *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60
5. *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014
6. *Grant Forest Products Inc. v. The Toronto-Dominion Bank*, 2015 ONCA 570
7. *Ivaco Inc., Re*, 2006 CarswellOnt 6292
8. *Laurentian University of Sudbury*, 2022 ONSC 2927
9. *Nordstrom Canada Retail, Inc.*, 2023 ONSC 4199
10. *Re Harte Gold Corp*, 2022 ONSC 653
11. *Re Nortel Networks Corporation et al*, 2014 ONSC 6973
12. *Target Canada Co. (Re)*, 2015 ONSC 303
13. *Target Canada Co. (Re)*, 2015 ONSC 7574
14. *Timminco Ltd, Re*, 2014 ONSC 3393

Endorsement Cited

1. *In the Matter of a Plan of Compromise or Arrangement of Heritage Cannabis Holdings Corp. et al* (June 26, 2024) (Commercial List) CV-24-00717664-00CL (Endorsement) (Kimmel, J) (ONSC)
2. *In the Matter of a Plan of Compromise or Arrangement of Indiva Limited, Indiva Amalco Ltd., Indiva Inc. Vieva Canada Limited, and 2639177* (October 21, 2024) (Commercial List) CV-23-00722044-00CL (Endorsement) (Penny, J) (ONSC)
3. *In the Matter of a Plan of Compromise or Arrangement of Original Traders Energy Ltd. and 2496750 Ontario Inc.* (October 12, 2023) (Commercial List), CV-23-00693758-00CL (Endorsement) (Kimmel, J) (ONSC)

SCHEDULE B – STATUTES AND REGULATIONS RELIED ON

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36**

Section 11

General power of court
Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 111992, c. 27, s. 901996, c. 6, s. 1671997, c. 12, s. 1242005, c. 47, s. 128.

Section 11.02

Stays, etc. – initial application
(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

> **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application
(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application
(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction
(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F)2019, c. 29, s. 137.

Section 23

Duties and functions
23(1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(d.1) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs (b) to (d.1);

(f) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(f.1) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the Bankruptcy and Insolvency Act, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

2005, c. 47, s. 1312007, c. 36, s. 72

SCHEDULE C – *Ivaco Inc., Re,* 2006 CarswellOnt 6292

DATE: 20061017
DOCKET: C44455

COURT OF APPEAL FOR ONTARIO

06 291 080

LASKIN, ROSENBERG AND SIMMONS JJ.A.

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.	**Frederick L. Myers and Jason Wadden for the appellant, The Superintendent of Finance Services (Ontario)**
AND IN THE MATTER OF A Plan or Plans of Compromise or Arrangement of Ivaco Inc. and the Applicants listed in Schedule "A"	**Andrew Hatnay for the respondent, Quebec Pension Committee of Ivaco Inc.**
	Jeffrey S. Leon and Richard B. Swan for the respondent, National Bank of Canada
	Dan V. MacDonald for the respondent, Bank of Nova Scotia
	Geoff R. Hall for the respondent, QIT-Fer et Titane Inc.
	Robert W. Staley and Evangelia Kriaris for the respondent, Informal Committee of Noteholders
	Peter F.C. Howard for the Monitor, Ernst & Young Inc.
	Heard: February 22, 2006

On appeal from the three orders of Justice James M. Farley of the Superior Court of Justice all dated July 18, 2005, reported at [2005] O.J. No. 3337.

LASKIN J.A.:

A. INTRODUCTION

[1] This appeal arises out of a priorities dispute between two groups of creditors of an insolvent company, Ivaco Inc., and its related group of companies. The dispute is over the sale proceeds of the assets of Ivaco. On one side of the dispute are the employees and retirees in Ivaco's underfunded non-union pension plans. They claim under the deemed trust and lien provisions of Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P.8, ss. 57(3), (4) ("PBA"), and seek to recover unpaid contributions to the plans outside of bankruptcy. On the other side of the dispute are Ivaco's financial and trade creditors. They wish to put Ivaco into bankruptcy in order to take advantage of the scheme of distribution under the federal *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). The dispute arises because provincial deemed trusts do not, by virtue of that legislative designation, enjoy priority under the federal bankruptcy statute.

[2] Ivaco and its related group of companies (collectively "the Companies") became insolvent in 2003. In September 2003, the Companies sought and obtained court-ordered protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). All claims of creditors were stayed. A later order stayed the Companies' obligation to pay the outstanding past service contributions and special payments to the non-union pension plans. (Past service contributions are monies due to fund benefits or benefit enhancements for pension members' past service; special payments are extraordinary payments made because a pension plan is underfunded).

[3] The main purpose of CCAA proceedings is to facilitate the restructuring of an insolvent company so that it may stay in business. The Companies, however, were unable to restructure. In late 2004, virtually all of their assets were sold. All that remains is a pool of money: the proceeds of sale. All that remains to be done is to distribute this pool of money among the creditors.

[4] The Superintendent of Financial Services, representing the employees and retirees, brought a motion for an order that part of the sale proceeds be used to satisfy the unpaid past service and special contributions, which the Companies are deemed to hold in trust for the beneficiaries of the pension plans under the PBA. Alternatively, the Superintendent sought an order segregating this amount in a separate account. The Quebec Pension Committee ("QPC"), the administrator of the largest non-union plan, supported the Superintendent's motion. Two of the Companies' lenders, the Bank of Nova Scotia and the National Bank, brought motions for an order lifting the stay under the CCAA and petitioning the Companies into bankruptcy.

[5] Farley J., who had supervised these CCAA proceedings for over two and a half years, heard all three motions. By order dated July 18, 2005 he dismissed the Superintendent's motion and partly granted the banks' motions. He lifted the stay and permitted the bankruptcy petitions to proceed, but he did not put the Companies into bankruptcy.

[6] The Superintendent appeals. She argues that the motions judge erred either in law or in the exercise of his discretion. The Superintendent submits that the motions judge erred in law by failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount. The Superintendent contends that the PBA legally required that the deemed trusts for unpaid past service contributions and special payments be executed or protected before bankruptcy.

[7] Alternatively, the Superintendent submits that the motions judge erred by exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed without first protecting the claims of the pension beneficiaries. The Superintendent contends that the motions judge exercised his discretion on a wrong principle because he ignored the unfairness and prejudice to the Companies' most vulnerable creditors.

[8] The Superintendent also appeals an ancillary order made by the motions judge. To facilitate the bankruptcy petitions, the motions judge ordered that the head offices of two of the Companies be transferred from cities in Quebec to Toronto. The Superintendent and the QPC submit that the motions judge had no jurisdiction under the CCAA to do so, or alternatively, improperly exercised his discretion in doing so.

[9] This court granted leave to appeal under s. 13 of the CCAA. The court also stayed the two orders in favour of the banks pending the disposition of the appeal.

B. RELEVANT FACTS AND CHRONOLOGY

a) The Companies

[10] Six related corporations were granted protection under the CCAA: Ivaco Inc., Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc., Docap (1985) Corporation, Florida Sub One Holdings Inc. and 3632610 Canada Inc. Four of these corporations – Ivaco, IRM, Ifastgroupe and Docap – established the non-union pension plans in issue on this appeal.

[11] Ivaco, IRM and Ifastgroupe ceased operations after their assets were sold. Only Docap now has any operating assets. Its assets consist mainly of inventory and accounts receivable that have not yet been sold. Docap is a small entity. Neither restructuring it nor selling it as a going concern seems a viable option. The National Bank, Docap's

principal secured creditor, wishes to put the company into bankruptcy and liquidate its assets.

b) The non-union pension plans

[12] The Companies had both a unionized and non-unionized workforce. They established various registered pension plans for their employees. These included four non-union plans: the Ivaco Salaried Plan, which is registered in Quebec and has both Quebec and Ontario members; the Designated Employees Plan, the Ingersoll Plan and the Docap Plan, all registered in Ontario.

[13] The QPC administers the Ivaco Salaried Plan, which is the largest of the four plans. Ivaco formerly administered the other three plans. However, the Superintendent appointed PricewaterhouseCoopers Inc. as administrator of the Designated Employees Plan and the Ingersoll Plan. A former Ivaco employee administers the Docap Plan for Ivaco.

c) The initial stay under the CCAA

[14] After their operations became financially troubled, the Companies sought and were granted protection from their creditors under the CCAA. On September 16, the motions judge granted a comprehensive stay of all creditor claims up to that time. He appointed Ernst & Young Inc. as Monitor. As a result of the stay, debts of the Companies existing on the date of the initial stay order have not been paid.

[15] During the CCAA proceedings the Companies continued to pay the wages and benefits of all active employees. The Companies also continued to pay their current contributions to their various pension plans.

d) The pension stay order

[16] When the Companies began CCAA proceedings, the non-union pension plans were underfunded. Before the initial stay order the Companies had been making both special payments and past services contributions to rectify this underfunding. Under the PBA, past service contributions accrue daily and are to be paid monthly.

[17] Early in the CCAA proceedings, the Monitor concluded that the Companies would jeopardize their ability to restructure if they were required to continue making past service contributions and special payments. Because of the magnitude of these payments, the creditors would not agree to permit the DIP (debtor in possession) loan to be used for funding the pension plans. In their view, and in the view of the Monitor, doing so would imperil the possibility of restructuring. Relying on the Monitor's opinion, the Companies sought, and on November 28, 2003, were granted a pension stay order.

[18] The motions judge relieved the Companies from making past service contributions or special payments to the underfunded non-union pension plans during the CCAA stay. No interested party, including both the Superintendent and the QPC, opposed the order. All parties thought that relieving the Companies from making these payments would assist their restructuring efforts. The Companies still remained obligated to make current contributions to the non-union plans.

[19] Paragraph 4 of the pension stay order stipulated that none of the Companies would incur any obligation because of the failure to make these past service contributions and special payments during the stay period:

> THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

[20] Paragraph 5 of the pension stay order expressly recognized that statutory deemed trust, liens or other charges may arise because the Companies were relieved from paying past service contributions but that they would not have priority over the charges in the initial stay order:

> THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim, lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated order.

[21] Paragraph 6 of the order recognized that the pension stay did not compromise the Companies' obligations under their non-union pension plans:

> Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

e) The sale to Heico

[22] As the Companies were unable to restructure, they began to pursue a second option: selling their assets in a going concern sale. On August 18, 2004, the motions judge approved the sale of the assets of Ivaco, Ifastgroupe and IRM to the Heico Companies. As part of the transaction, the purchaser hired the Companies' unionized workforce and assumed the Companies' obligations to their unionized pension plans. The purchaser also hired almost all of the Companies' non-unionized workforce, but it was unwilling to assume the Companies' obligations to the four non-union pension plans. These obligations remained with the Companies.

[23] Nonetheless, the Monitor supported the sale. In the Monitor's view, the sale gave the creditors and workers greater recovery and benefits than they would obtain in either a bankruptcy or a liquidation. Again, no party, including both the Superintendent and the QPC, opposed the sale.

[24] The motions judge made two orders — on August 18, 2004 and November 30, 2004 — vesting the assets in the purchaser. These orders expressly preserved all claims that might have been made against the assets by providing that these claims could be made against the sale proceeds. In accordance with these orders, the Monitor is holding the sale proceeds in various trust accounts.

[25] In December 2004, Ivaco, IRM and Ifastgroupe wound-up their non-union pension plans. Under the PBA, they are obligated to fund the wind-up liabilities of these plans.

f) The pension claims

[26] The Companies' non-union pension plans have been severely underfunded and the deficit has increased during the stay period. At the beginning of the CCAA proceedings in September 2003, unpaid past service contributions to the non-union plans totalled about $1.4 million and the solvency deficiency amounted to approximately $11.1 million. By December 2004 these figures had grown to approximately $11.6 million and $29.1 million respectively. They continued to grow while the pension stay order remained in place.

[27] The potential loss of benefits for each pensioner is significant. Counsel for the Superintendent advised the court that the average pensioner in the non-union plans is sixty-seven years old and earns a pension of $14,000 per year. These pensioners will

receive their full pension only if the full wind-up deficit is paid. For example, if the plans do not recover the past service contributions suspended by the pension stay order, the average monthly pension will be reduced by 26 per cent from approximately $1,200 to $888. If only unpaid contributions are recovered, and not the full solvency deficiency, the average pension will be reduced by 17 per cent to $996 monthly.

g) The claims of the financial creditors

[28] The outstanding claims of the financial creditors of the Companies are also significant. We were told that the sale proceeds of the Companies' assets are insufficient to satisfy all claims, and are certainly insufficient to satisfy the unsecured claims.

[29] The Bank of Nova Scotia was the lender to IRM. By October 2003, IRM owed the Bank about $40 million. IRM had ceased to meet its liabilities generally as they became due, and had given notice to its creditors that it had suspended payment of its debts. On October 3, 2003 the Bank issued a petition for a receiving order against IRM. The issuance of the petition was permitted by the initial stay order, but that proceeding was otherwise stayed. The order under appeal lifted the stay and permitted the Bank of Nova Scotia to proceed with its petition.

[30] The National Bank lent money to Ivaco, Ifastgroupe and Docap. As of March 2005 it had a secured claim against Ivaco for $17 million,[1] and against Docap for $55,622 U.S. and $4.2 million Canadian. It also had an unsecured claim against Ifastgroupe for $45.5 million Canadian. Ifastgoupe is also indebted to La Caisse for $14.9 million.

[31] A large number of other creditors also have claims against the Companies: Ivaco has 792 creditors with claims totalling $554.9 million; Docap has 82 creditors with claims totalling $111.1 million; and Ifastgroupe has 645 creditors with claims totalling $253.3 million.

C. ANALYSIS

a) What is in issue on this appeal

[32] The scope of this appeal is quite narrow. There are three issues:

1) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts under the PBA or in failing to segregate this amount in a separate account?

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[1] Taking into account a $12 million distribution to the National Bank permitted by the motions judge in December 2004.

2) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed, without protecting the claims of the pension beneficiaries?

3) Did the motions judge err in law or in the exercise of his discretion by ordering the transfer of Ivaco's and Ifastgroupe's head offices from Quebec to Toronto?

b) What is not in issue on this appeal

[33] There are also three issues raised by the parties that do not need to be decided on this appeal: (1) whether, outside of bankruptcy, the deemed trusts under the PBA have priority over the Bank of Nova Scotia's security under s. 427 of the *Bank Act*, S.C. 1991, c.46; (2) whether the Superintendent can show "sufficient cause" under s. 43(7) of the BIA to deny the application for a bankruptcy order; and, (3) whether the deemed trusts under the PBA also meet the requirements for a common law trust and thus on bankruptcy should be excluded from the property of the Companies under s. 67(1)(a) of the BIA.

[34] On my view of the appeal, the first of these issues does not have to be resolved. It may become relevant at the bankruptcy hearing, and, if so, should be dealt with by the bankruptcy judge. See *Abraham v. Canadian Admiral Corp. (Receiver of)* (1998), 39 O.R. (3d) 176 (C.A.). The second and third issues, I assume, will be dealt with at the hearing of the bankruptcy petitions. Admittedly, the motions judge made some observations on these two issues. However, he also said, at para. 20 of his reasons, that he was not deciding either one:

> However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

[35] In their written and oral submissions, the Superintendent and the QPC argued that some of the motions judge's general observations on these issues were wrong. I do not propose to consider these arguments because, as the motions judge recognized, they should be addressed at the hearing of the bankruptcy petitions. Instead, I will make a few brief observations of my own.

[36] In my view, the motions judge appropriately considered what would likely happen at the bankruptcy hearing. He did so because the likely implications of lifting the stay were relevant considerations to the exercise of his discretion.

[37] The motions judge observed, at para. 14, that the discretion to refuse to make a bankruptcy order under s. 43(7) typically is exercised in two categories of cases: where the petitioner has an ulterior motive in seeking the order, or where the order would not serve any meaningful purpose. This observation reflects the current state of the case law under s. 43(7). See for example *Re Dallas/North Group Inc.* (1999), 46 O.R. (3d) 602 (Gen. Div.); *Buth-na-bodhiaga, Inc. v. Lambert* (2002), 60 O.R. (3d) 787 (C.A.). Although the motions judge added that the Superintendent's claim does not appear to come within either category, he left the final determination of that question for the bankruptcy judge.

[38] The motions judge also observed, at para. 11 of his reasons, that a provincially created deemed trust does not by that fact alone enjoy priority under the BIA. This is not a contentious proposition. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the federal statute. See for example *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24; *Husky Oil Operations Ltd. v. Minister of National Revenue,* [1995] 3 S.C.R. 453. Indeed, it is this jurisprudence that undoubtedly prompted the Superintendent's original motion and appeal to this court.

[39] The motions judge also correctly observed, at para. 11 of his reasons, that a provincial deemed trust will retained its priority in bankruptcy only if it also meets the three attributes – the three certainties – of a common law trust: certainty of intent; certainty of subject matter; and certainty of object. Only a trust that has these three attributes is a "true trust" that will be exempt from the bankrupt's estate under s. 67(1)(a) of the BIA. See for example *Henfrey Sampson, supra.* Whether the Superintendent can establish a true trust for unpaid past service contributions, even though the proceeds of the Heico sale have been commingled, will be decided at the bankruptcy hearing.

[40] I now turn to the issues that do arise on this appeal.

c) Did the motions judge err in law in failing to order immediate payment of the amount of the deemed trusts or in failing to segregate this amount?

[41] The Superintendent's principal submission is that the motions judge erred in law in failing to order payment of the amount of the deemed trusts before bankruptcy or in failing to order the Monitor to segregate this amount during the CCAA proceedings. The submission that the motions judge was legally required to order payment or segregation

of the amount of the deemed trusts was not advanced before him. The Superintendent advanced this submission for the first time in this court. I do not agree with it.

[42] I will deal first with whether the motions judge should have required the Monitor, Ernst & Young, to segregate the amount of the deemed trusts. The Superintendent contends that the Companies, and in their place the Monitor, had a statutory and fiduciary obligation to segregate. As the Monitor was an officer of the court, the motions judge should have compelled it to fulfill these duties. This contention faces three obstacles: the language of the PBA; the terms of the pension stay order; and the status and role of the Monitor.

[43] The deemed trusts for unpaid past service and special contributions are found in ss. 57(3) and (4) of the PBA. Subsection (3) is the basic provision that creates a deemed trust for unpaid employer contributions. Subsection (4) stipulates that on the wind up of a pension plan, employer contributions accrued but not yet due because of the timing of the wind up are also deemed to be held in trust:

> s. 57(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> s. 57(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[44] At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R 235, Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act, 1987*, S.O. 1987, c.35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco* is correct, but I do not need to resolve the issue on this appeal.

[45] Under s. 57(5) of the PBA the plan administrator has a lien and charge on the assets of the employer for the amount of any deemed trust. The lien and charge permit the administrator to enforce the deemed trust.

> s. 57(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

[46] The Superintendent argues that these provisions required the Companies, and in their place the Monitor, to keep the unpaid contributions in a separate account. However, the language of s. 57 does not require the employer to hold the contributions separately. A "deemed trust" is, in a sense, a legal fiction. Outside of bankruptcy it does create a priority for pension contributions, a priority that would not exist but for the designation. Yet, as I have already said, this legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account it must legislate that separation. It has not done so.

[47] The Superintendent argues that the pension stay order supports her position because para. 5 the order, *supra*, recognized that a deemed trust for unpaid contributions may arise during the stay period and that para. 6 of the stay order, *supra*, did not compromise the Companies' obligation to make these contributions. This argument fails to take account of para. 4 of the pension stay order. Paragraph 4 stipulates that during the stay the Companies will not incur any obligation – statutory, fiduciary or otherwise – for failing to make contributions to the plan. In my view, the Superintendent's argument amounts to an impermissible collateral attack on para. 4 of the pension stay order.

[48] The Superintendent also tries to buttress her position by arguing that the Monitor stands in the shoes of the Companies, and like the Companies, has a fiduciary duty to the pension beneficiaries. I disagree.

[49] The Monitor was appointed under s. 11.7(1) of the CCAA to "monitor the business and financial affairs" of the Companies, and was given the functions set out in s. 11.7(3) of that statute: to examine the Companies' property, report to the court on the Companies' business and financial affairs and keep the creditors informed. Although the motions judge gave the Monitor additional powers, they were limited. The Monitor was given authority to deal with day-to-day administrative matters, to finalize the sale to Heico and to receive and control the proceeds of sale. I do not think it can be fairly said that the Monitor "stands in the shoes of the Companies".

[50] Equally important, the Monitor does not owe a fiduciary duty to the pension beneficiaries. The Superintendent's attempt to impose an obligation on the Monitor to segregate the contributions to the non-union plans depends at least on establishing that the Monitor acts as a fiduciary of the employees in those plans. Both the role of the Monitor and the initial stay order preclude the Superintendent's assertion.

[51] Pension plan administrators do owe a fiduciary duty to plan members. See E.E. Gillese, *The Fiduciary Liability of the Employer as Pension Plan Administrator* (Toronto: The Canadian Institute, November 18, 1996, pp. 1-25). But the Monitor was not given that role. It is not an administrator of any of the four non-union plans. Indeed, the Superintendent never asked the court to give the Monitor responsibility for administering these plans.

[52] Moreover, para. 59 of the initial stay order expressly states that the Monitor is not to be considered either a successor or related employer.

> THIS COURT ORDERS that nothing in this Order shall result in the Monitor being or being deemed or considered to be a successor or related employer, sponsor or payor with respect to any Applicant or any employees or former employees of any Applicant under any legislation, including ... the *Pension Benefits Act* (Ontario) ... or under any other provincial or federal legislation, regulation or rule of law or equity applicable to employees or pensions, or otherwise." [Emphasis added].

As the Monitor was neither a plan administrator nor a successor employer, it can owe no fiduciary duty to the members of the four plans.

[53] Therefore, the combination of the wording of s. 57 of the PBA, para. 4 of the pension stay order and the limited role of the Monitor, refute the Superintendent's segregation argument. The Superintendent, however, submits that two cases, the decision of this court in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 74 O.R. (3d) 382 (C.A.) and an earlier decision of the motions judge in *Usarco*, *supra*, support the argument for segregation. In my view, both cases are distinguishable.

[54] In *TCT Logistics,* this court held that an interim receiver, who was both an officer of the court and stood in the shoes of the debtor, had a statutory duty under the legislation then in force, s. 15 of the *Load Brokers Regulation*, O.Reg. 556/92 (passed under the *Truck Transportation Act*, R.S.O. 1990, c. T.-22) to hold carriers' fees that it had collected in a separate trust account. *TCT Logistics* and this case differ in three critical ways.

[55] First, the interim receiver in *TCT Logistics*, was not just an officer of the court, it stood in the place of the debtor company. Here, although the Monitor is an officer of the court, it does not stand in the place of the Companies. For the reasons outlined in para. 49 its role is far more limited.

[56] Second, in *TCT Logistics* the court order authorized the interim receiver to hold the carriers' fees in a separate bank account until entitlement to that money was decided. Here, the pension stay order prohibited the Companies from making any past service or special contributions during the stay period.

[57] Third, and perhaps most important, the applicable legislation in *TCT Logistics,* s. 15(2) of the *Load Brokers Regulation* required the debtor company to maintain a separate trust account and to keep the fees it collected for the carriers in that account. Here, s. 57 of the PBA does not similarly require an employer to keep its unpaid contributions in a separate trust account. Moreover, in *TCT Logistics,* despite s. 15(2) of the Regulation, this court held that the carrier fees previously collected by the debtor company lost their character as trust money because they had been commingled with other funds. *TCT Logistics* thus does not support the Superintendent's position.

[58] In *Usarco, supra,* at para. 16, Farley J. commented that the deemed trust provisions of the PBA "implied a fiduciary obligation on the part of Usarco", and that "a trustee in bankruptcy stepping into the shoes of Usarco must deal with that fiduciary obligation". These comments do not apply to this case. The Monitor here, unlike the trustee in bankruptcy in *Usarco,* did not step into the shoes of the debtor. Thus, *Usarco* does not assist the Superintendent.

[59] For these reasons, I reject the Superintendent's argument that the motions judge was required in law to order the segregation of the amount of the deemed trusts during the CCAA proceeding. I now turn to the Superintendent's other submission: that the motions judge was required in law to order that the amount of the deemed trust be paid at the end of the CCAA proceedings, but before bankruptcy.

[60] The CCAA itself did not require the motions judge to execute the deemed trusts. The Superintendent cannot point to any section of the statute where a legal obligation to order payment of the past service contributions can be found. Moreover, in my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds. See for example *Re United Maritimes Fisheries Cooperative* (1988), 68 C.B.R. (N.S.) 170 at 173 (N.B.Q.B.).

[61] The Superintendent's submission that the motions judge was required to order payment of the outstanding contributions rests on the proposition that a gap exists between the CCAA and the BIA in which the provincial deemed trusts can be executed. This proposition runs contrary to the federal bankruptcy and insolvency regime and to the principle that the province cannot reorder priorities in bankruptcy.

[62] The federal insolvency regime includes the CCAA and the BIA. The two statutes are related. A debtor company under the CCAA is defined in s. 2 by the company's bankruptcy or insolvency. Section 11(3) authorizes a thirty-day stay of any current or prospective proceedings under the BIA, and s. 11(4) authorizes an extension of the initial thirty-day period. During the stay period, creditor claims and bankruptcy proceedings are suspended. Once the stay is lifted by court order or terminates by its own terms, simultaneously the creditor claims and bankruptcy proceedings are revived and may go forward.

[63] For the Superintendent's position to be correct, there would have to be a gap between the end of the CCAA period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the CCAA period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the CCAA. Once the motions judge lifted the stay, the petition was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

[64] Where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings. The CCAA and the BIA create a complementary and interrelated scheme for dealing with the property of insolvent companies, a scheme that occupies the field and ousts the application of provincial legislation. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result.

[65] Also, giving effect to the Superintendent's position, in substance, would allow a province to do indirectly what it is precluded from doing directly. Just as a province cannot directly create its own priorities or alter the scheme of distribution of property under the BIA, neither can it do so indirectly. See *Husky Oil, supra,* at paras. 32 and 39. At bottom the Superintendent seeks to alter the scheme for distributing an insolvent company's assets under the BIA. It cannot do so.

[66] The Superintendent relies on one authority in support of its position: the decision of the motions judge in *Usarco, supra.* In that case, although a bankruptcy petition had been brought, Farley J. nonetheless ordered the receiver to pay to the pension plan administrator the amount of the deemed trusts under the PBA. However, the facts in *Usarco* differed materially from the facts in this case.

[67] In *Usarco*, CCAA proceedings did not precede the bankruptcy petition. Moreover, in *Usarco* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco* it was unclear whether bankruptcy proceedings would ever take place.

[68] Recently in *Re General Chemical Canada Ltd.*, [2005] O.J. No. 5436, Campbell J. relied on this distinction, followed the motions judge's decision in the present case and refused to order payment of the amount of the deemed trusts under the PBA. He wrote at para. 35:

> To conclude otherwise (absent improper motive on the part of Company or a major creditor) would be to negate both CCAA proceedings and bankruptcy proceedings by preventing creditors from pursuing a process of equitable distribution of the debtor's property as they believe it to be when making their decisions.

I agree. The factual differences between *General Chemical* and this case on the one hand, and *Usarco* on the other, render *Usarco* of no assistance to the Superintendent on this appeal.

[69] Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given greater priority, Parliament, not the courts, must do so. And Parliament has at least signalled its intention to do so. Last year it passed the *Wage Earner Protection Program Act*, S.C. 2005 c.47. That Act would amend the BIA and give special priority to unpaid pension contributions of a bankrupt employer. This statute, however, has not been proclaimed in force. That it was passed perhaps shows that under the existing legislative regime, claims like that of the Superintendent must fail. I would reject this ground of appeal.

d) Did the motions judge err in the exercise of his discretion by lifting the stay and permitting the bankruptcy petitions to proceed?

[70] In my view, the motions judge's order lifting the stay was a discretionary order. He summarized his reasons for rejecting the Superintendent's position and exercising his discretion to allow the bankruptcy petitions to proceed at para. 18 of his decision:

> In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and

> con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed and un-reconsidered order of November 28, 2003), the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

[71] Appellate review of a discretionary order under the CCAA is limited. See *Re Air Canada* (2003), 66 O.R. (3d) 257 at para. 25 (C.A.); *Re Royal Crest Lifecare Group Inc.* (2004), 46 C.B.R. (4th) 126 at para. 23 (Ont. C.A.); *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 at para. 16 (C.A.). Appellate intervention is justified only for an error in principle or the unreasonable exercise of discretion. The Superintendent submits that the motions judge exercised his discretion improperly – on a wrong principle – because he ignored the "unfair and prejudicial" effects of his order on the Companies' most vulnerable class of creditors: the pension beneficiaries. I disagree.

[72] The Superintendent argues that the motions judge's order was unfair to the pension beneficiaries in three related ways. First, she points out that the pension beneficiaries agreed to a stay of the past service contributions to keep the Companies afloat, which in turn permitted the going concern sale to Heico. That sale greatly enhanced the return to the creditors. The Superintendent contends that now permitting the bankruptcy petitions to proceed, which would potentially deprive the pension beneficiaries of their rights, produces an unfair outcome.

[73] Undoubtedly, and regrettably, the pension beneficiaries stand to suffer from the insolvency of the Companies. However, the Superintendent's argument implicitly assumes that the pension beneficiaries alone made sacrifices to maximize the recovery for all creditors. The motions judge rejected this assumption, which he said at para. 2 of his reasons, "somewhat overstates the situation". The motions judge accurately concluded:

> [O]ther stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due.

In short, all creditors gave up something to permit the Companies to stay in business so that they could either reorganize or sell their assets in a going concern sale.

[74] Second, the Superintendent contends that the motions judge's order undermined his earlier pension stay order, which had expressly preserved the pension beneficiaries' deemed trust rights. I do not accept this contention. Although the pension stay order did not take away these deemed trust rights, it did not provide that the deemed trusts would be paid out of any sale proceeds. Instead, para. 4 of the pension stay order provided that the Companies would not incur any obligation because of their failure to pay past service contributions during the stay period. Moreover, even though the Superintendent and the QPC knew that a petition for bankruptcy (by the Bank of Nova Scotia) was pending when they agreed to the pension stay order, they did not ask that the order be conditional on payment of the amount of the deemed trusts when the stay was lifted.

[75] The third aspect of unfairness on which the Superintendent relies is that the motions judge's order fails to take account of the law's "special solicitude" for pensioners. Certainly provincial pension legislation has shown this solicitude. It has recognized the importance of ensuring that retirees have income security. Thus, it has legislated statutory trusts and liens to protect their pension claims. But federal insolvency law has not shown the same solicitude. It does not accord the claims of "sympathetic" creditors more weight than the claims of "unsympathetic" ones. Subject to specified exceptions, the BIA aims to distribute a bankrupt debtor's estate equitably among all of the estate's creditors. There are undoubtedly compelling policy reasons to protect pension rights in an insolvency. But, as I have said, it is for Parliament, not the courts, to do so.

[76] Therefore, I do not accept the Superintendent's unfairness argument. Also, in my view, numerous considerations supported the motions judge's decision to lift the stay and permit the bankruptcy petitions to proceed. These considerations include the following:

- The CCAA proceedings are spent. There are no entities to reorganize and no further compromises can be negotiated between the Companies and their creditors. There remains only a pool of money to distribute. The BIA is the regime Parliament has chosen to effect this distribution.

- The petitioning creditors have met the technical requirements for bankruptcy. And their desire to use the BIA to alter priorities is a legitimate reason to seek a bankruptcy order. See for example *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 at 627, 630-631 (B.C.C.A); *Re Harrop of Milton Inc.* (1979), 22 O.R. (2d) 239 at 244-245 (S.C.).

- The Superintendent and the QPC agreed to the CCAA process. They recognized that it benefitted the pension claimants. Thus, they did not oppose either the pension stay order or the sale to Heico. They did not ask to have the deemed trusts satisfied or an amount to satisfy them set aside, though they

knew that bankruptcy was pending. They likely recognized that if they had insisted on a segregation order, the other creditors may not have agreed to the sale. It is now too late for the Superintendent and the QPC to ask for relief that they never sought during the entire CCAA process.

- The motions judge would have gone beyond his role as a referee in the CCAA proceedings if he had given effect to the Superintendent's claim. The Superintendent wants to jump ahead of all the other creditors by obtaining an extraordinary payment at the end of a long CCAA process. If the motions judge had ordered this payment, he would have upset the ground rules that all stakeholders agreed to and that he supervised for over two years.

[77] The motions judge took into account the likely result of the Superintendent's claims if the Companies are put into bankruptcy. He recognized that bankruptcy would potentially reverse the priority accorded to the pension claims outside bankruptcy. Nonetheless, having weighed all the competing considerations, he exercised his discretion to lift the stay and permit the bankruptcy petitions to proceed. In my view, he exercised his discretion properly. I would not give effect to this ground of appeal.

e) Did the motions judge err by ordering the transfer of Ivaco and Ifastgroupe's head offices from Quebec to Toronto?

[78] Ivaco's head office was in Montreal; Ifastgroupe's head office was in Marieville, Quebec. The motions judge ordered that these head offices be transferred to Toronto. He did so in the light of s. 43(5) of the BIA, which states that an application for a bankruptcy petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor. The Superintendent, supported by the QPC, submits that the motions judge had no jurisdiction to make this order, or that he improperly exercised his discretion in doing so. I disagree with both submissions.

[79] The Superintendent and the QPC contend that the CCAA does not expressly authorize a judge to transfer the location of the head office of a debtor company. And, although a judge in CCAA proceedings has inherent jurisdiction to control the court's processes, the judge does not have a similar jurisdiction to do what the motions judge did here: control the debtor Companies' or the creditors' processes. See *Re Stelco Inc.* (2005), 75 O.R. (3d) 5 at para. 38 (C.A).

[80] I accept the Superintendent's and the QPC's contention that the CCAA did not give the motions judge jurisdiction to order the transfer. I also accept that the transfer was not made to facilitate a restructuring under the CCAA. Instead it was made to facilitate future bankruptcy proceedings. Nonetheless, in my view, the motions judge did not need to resort to the CCAA because he had express authority to order the transfer in s.

191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. Sections 191(1) and (2) provide:

> s. 191(1) In this section, "reorganization" means a court order made under;
>
> (a) section 241;
>
> (b) the *Bankruptcy and Insolvency Act* approving a proposal; or
>
> (c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.
>
> s. 191(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might be lawfully be made by an amendment under section 173.

[81] The applicable section here is section 191(1)(c). The stay order is an order under an Act of Parliament, the CCAA, that affects the rights among the Companies, its shareholders and its creditors. See *Re Beatrice Foods Inc.* (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div.). Therefore, as both Ivaco and Ifastgroupe were subject to an order under s. 191(1)(c) of the CBCA, under s. 191(2) each of its articles may be amended to effect any change that might be made by an amendment under s. 173. Section 173(1)(b) of the statute permits a corporation to change the location of its head office:

> s. 173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> ...
>
> (b) change the province in which its registered office is situated;

[82] On my reading of the statute, s. 191 is a stand-alone section that gave the motions judge authority to order the transfer. Provided a corporation is subject to an order under s. 191(1), its articles may be amended. The amending order under s. 191(2) need not serve the purpose of the triggering statute in s. 191(1), in this case the CCAA. If Parliament had wanted to limit amendments to those that would facilitate a reorganization, it could have said so. Thus, the combination of ss. 191(1)(c), 191(2) and 173(1)(b) gave the motions judge the jurisdiction to order the transfer of Ivaco and

Ifastgroupe's head offices from Quebec to Toronto. Resort to the CCAA was unnecessary.

[83] The Superintendent and the QPC rely on this court's decision in *Re Stelco* in support of their argument. However, that case differs from the present case in a material way. In *Re Stelco* the issue was whether a motions judge in CCAA proceedings could order the removal of two members of the company's board of directors under s. 109(1) of the CBCA. The power to remove directors is vested in the shareholders. Blair J.A. held that the motions judge could not rely on the court's discretion under s. 11 of the CCAA to override or supplant the specific power in s. 109(1) of the CBCA. The discretion under s. 11 must be used to control the court's processes, not the company's processes.

[84] By contrast, in the present case, s. 191 of the CBCA gives the court express authority to order the transfer of the head office of a company that is subject to an order under the CCAA. Thus, to make a transfer order, the court need not rely on its discretion under s. 11 of the CCAA.

[85] However, the jurisdiction in s. 191(2) is discretionary, as evidenced by the use of the word "may". Therefore, the remaining question on this ground of appeal is whether the motions judge properly exercised his discretion in ordering the transfer. I think that he did.

[86] Ivaco and Ifastgroupe had not actively carried on business since the sale of their assets to Heico was completed in December 2004. The Monitor holds the proceeds of the sales in bank accounts in Toronto. Because of the lengthy and complex CCAA proceedings, the Ontario Superior Court – Commercial List is familiar with the affairs of Ivaco and Ifastgroupe. Having all the issues common to all the Companies administered at the same time before the court familiar with these issues will facilitate the most efficient, consistent and just administration and distribution of their estates.

[87] The QPC, in particular, objects to these head office transfers. It argues that the motions judge's order will enable the creditors to defeat a future motion to transfer to the Quebec Superior Court the question whether the Companies participating in the Ivaco Salaried Plan are "solidarily liable", that is jointly and severely liable, under Quebec law for satisfying the obligation to fund the plan.

[88] The underpinning of the QPC's argument is as follows: the "solidarily liable" provision is unique to Quebec law and therefore should be decided by a Quebec court. Whether the Quebec or the Ontario Superior Court presides over this future motion will turn on the application of the *forum conveniens* principle. One relevant factor in assessing the *forum conveniens* is the residence or place of business of the parties. According to the QPC, transferring Ivaco's and Ifastgroupe's head offices to Toronto will

tip the scales in favour of the Ontario Superior Court hearing the "solidarily liable" motion.

[89] It seems to me that this is a weak argument. The QPC has not yet brought this motion. When it does, the Ontario Superior Court can assess the relevant considerations affecting the appropriate forum. Now, however, the motions judge's transfer order just makes good sense. He, therefore, exercised his discretion properly. I would not give effect to this ground of appeal.

D. CONCLUSION

[90] The motions judge did not err in law in refusing to order the immediate payment of the amount of the deemed trusts under the *Pension Benefits Act* or in refusing to segregate that amount. Nor did he err in exercising his discretion to lift the stay under the CCAA and permit the bankruptcy petitions to proceed. Finally, the motions judge did not err in ordering that the head offices of Ivaco and Ifastgroupe be transferred from Quebec to Toronto. Accordingly, I would dismiss the Superintendent's appeal.

[91] If the parties cannot agree on the costs of the appeal, they may make written submissions to the court. These submissions should be delivered within 30 days of the release of these reasons.

RELEASED:

"OCT 17 2006"
"JL"

"John Laskin J.A."
"I agree M. Rosenberg J.A."
"I agree Janet Simmons J.A."

21p

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BZAM LTD., BZAM HOLDINGS INC., BZAM MANAGEMENT INC., BZAM CANNABIS CORP., FOLIUM LIFE SCIENCE INC., 102172093 SASKATCHEWAN LTD., THE GREEN ORGANIC DUTCHMAN LTD., MEDICAN ORGANIC INC., HIGH ROAD HOLDING CORP. AND FINAL BELL CORP.

Court File No.: CV-24-00715773-00CL

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SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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