Court File No. CV-12-9539-00CL

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 TIMMINCO LIMITED AND BECANCOUR SILICON INC.

Applicants

BOOK OF AUTHORITIES OF THE RESPONDENT, THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

May 17, 2012

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TAB 1

Indexed as:

GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.

Industrial Wood & Allied Workers of Canada, Local 700, Appellant/Respondent on cross-appeal
v.
GMAC Commercial Credit Corporation -- Canada, Respondent/Appellant on cross-appeal
and
T.C.T. Logistics Inc., T.C.T. Warehousing Logistics Inc., KPMG Inc., the Interim Receiver and Trustee in Bankruptcy of T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc., and TCT Logistics Inc., TCT Acquisition No. 1 Ltd., Atomic TCT Logistics Inc., Atomic TCT (Alberta) Logistics Inc., TCT Canada Logistics Inc., Inter-Ocean Terminals (B.C.) Ltd., Atomic Transport Inc., TCT Warehousing Logistics Inc., TCT Warehousing Logistics No. 2 Inc., R.R.S. Transport (1998) Inc., TCT Acquisition No. 2 Ltd., Tri-Line Expressways Ltd. (a successor to Tri-Line Expressways Ltd. and TCT Acquisition No. 3 Ltd.), Tri-Line Expressways, Inc., 2984008 Canada Inc., High-Tech Express & Distribution Inc., 606965 British Columbia Ltd. and 606966 British Columbia Ltd., Respondents

[2006] 2 S.C.R. 123

[2006] S.C.J. No. 36

2006 SCC 35

File No.: 30391.

Supreme Court of Canada

Heard: November 16, 2005;
Judgment: July 27, 2006.

Present: McLachlin C.J. and Major*, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

(167 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

[page124]

Subsequent History:

* Major J. took no part in the judgment.

Catchwords:

Bankruptcy and insolvency -- Bankruptcy court -- Jurisdiction -- Whether bankruptcy judge lacks jurisdiction to determine whether interim receiver is successor employer under provincial labour relations legislation -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 47, 72(1).

Bankruptcy and insolvency -- Procedure -- Action against interim receiver -- Bankruptcy legislation precluding proceedings against interim receiver without leave of court -- Union seeking leave to bring "successor employer" application against interim receiver -- Whether Mancini test applicable -- Whether test different when dispute relates to receiver's obligations to debtors' employees represented by union -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 215.

Summary:

The company TCT became insolvent and its largest secured creditor applied for an order appointing an interim receiver. The order appointing KPMG states that the receiver's employment-related actions could not be considered those of a "successor employer", and prohibits proceedings being taken against the interim receiver unless the court grants leave. After TCT was assigned in bankruptcy, KPMG sold most of the assets of the warehousing business to a new company. All unionized employees at the Toronto warehouse were terminated by KPMG, but some of them were later hired by the new company. Except for a change in location, the only major difference between TCT's operations and those of the new company was the absence of the union as representative of TCT's former employees.

The union applied to the Ontario Labour Relations Board seeking, in particular, a declaration that, as a successor employer to TCT or KPMG, the new company was bound by the collective agreement pursuant to s. 69 of the *Labour Relations Act, 1995* ("*LRA*"). After a stay was granted on the basis that s. 215 of the *Bankruptcy and Insolvency Act* ("*BIA*") precludes proceedings against an interim receiver or trustee without leave of the court, the union sought the necessary court approval. The bankruptcy judge amended the paragraph relating to the "successor employer" protection in the order appointing the interim receiver, but denied leave. The Court of Appeal unanimously concluded that only the labour board had jurisdiction [page125] to determine who was a successor employer, but divided over the test under s. 215 for granting leave to bring successor employer applications. The majority was of the view that the traditional *Mancini* test represented too low a threshold when the proposed proceedings were successor employer applications, and that other factors should be considered to take account to a greater extent of the impact of such litigation on the bankruptcy process. Accordingly, the majority set aside the bankruptcy judge's refusal to grant leave and remitted the leave application back to him for reconsideration based on the enhanced enumerated factors. The union appealed the Court of Appeal's order denying leave, and the secured creditor cross-appealed on the issue of the bankruptcy judge's jurisdiction.

Held (Deschamps J. dissenting on the appeal): The appeal should be allowed and the cross-appeal

dismissed.

Per McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ.: The bankruptcy court does not have jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *LRA*. The powers given to the bankruptcy court under s. 47(2) *BIA* are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes. Further, s. 72(1) *BIA* declares that unless there is a conflict, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the Act. The right to seek a successor employer declaration pursuant to the *LRA* does not conflict with the bankruptcy court's authority under s. 47(2). If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all rights. Explicit language would be required before such a sweeping power could be attached to s. 47. [para. 4] [paras. 43-51]

The bankruptcy judge erred in not granting leave to the union to bring a successor employer application against the interim receiver. Under the *Mancini* test, the threshold for granting leave under s. 215 *BIA* is not [page126] a high one. The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. If the evidence discloses a *prima facie* case, leave should be granted. The focus of the inquiry is not a determination of the merits. The threshold of the *Mancini* test strikes the appropriate balance between the protection of trustees and receivers from frivolous suits, while preserving to the maximum extent possible the rights of creditors and others as against a trustee or receiver. As a result, *Mancini* is consistent with the requirement that there be explicit statutory language before the *BIA* is interpreted so as to deprive persons of rights conferred under provincial law. Where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly. In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers. There is no reason to create a more stringent test to be applied only to claims by employees represented by unions. To impose a higher s. 215 threshold in a case involving a labour board issue is to read into the *BIA* a lower tolerance for the rights of employees represented by unions than for other creditors. Nothing in the Act suggests this dichotomy. Finally, the *Mancini* test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. In this case, since it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed. [para. 7] [paras. 55-61] [paras. 67-72] [para. 80]

Per Deschamps J. (dissenting on the appeal): A judge who must decide whether to grant leave to bring proceedings against a trustee under s. 215 *BIA* must determine the actual scope of the remedy being sought, identify potential conflicts and tailor the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the *BIA*. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law and the judge must therefore deny leave to bring them. [para. 154]

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The decision to continue operating the business is central to the trustee's role under the *BIA* and, in principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. The provisions of the *BIA* that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by

the *BIA*. The successor employer declaration is not free of pitfalls when it applies to a trustee. The effect of such a declaration is that the trustee becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. Although it is common ground that the *LRA* confers the exclusive power to decide who is a "successor employer" on the Ontario Labour Relations Board, the *LRA* cannot frustrate the purpose of the *BIA*. It is therefore important to strike a balance between the trustee's duties and immunities under the *BIA* and the employees' rights under the *LRA*. In the event of conflict, the parties must refer to constitutional principles. Courts that hear disputes relating to the difficulty of applying federal and provincial statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government. Where conflict is unavoidable, however, the federal statute is paramount to the provincial statute. Hence the importance of the screening mechanism of s. 215 *BIA*, which serves the purpose of ensuring that provincial and federal statutes do not conflict with each other. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts. [para. 91] [para. 101] [para. 103] [paras. 111-112] [paras. 116-117] [para. 123] [paras. 127-128]

Although the criteria established in *Mancini* for applying s. 215 are easy to apply to a simple action in damages based on wrongdoing by the trustee, they must, in other cases, be tailored to the specific nature of each application for leave. The judge must assess the nature and scope of the proceeding in light of the evidence. This review does not have the effect of giving special or different treatment to successor employer declarations. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and make provision for conflicts. By ensuring that the conclusions being sought do not impair the application of the *BIA* and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits [page128] the federal statute and provincial legislation to be applied simultaneously. A judge who denies leave to bring proceedings merely avoids a conflict by relying on the paramountcy doctrine in a preventive manner. However, the bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits. The judge's first task is to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy. The judge will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 *BIA*, which makes express provision for the application of provincial legislation that is compatible with the federal statute. [para. 124] [para. 135] [paras. 143-153]

In the instant case, the unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the *BIA*. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. [para. 162] [para. 166]

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By Abella J.

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Investments Ltd. v. Domgroup Ltd., [2004] 1 S.C.R. 60, 2004 SCC 3; *Randfield v. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075; *In re Diehl v. Carritt* (1907), 15 O.L.R. 202; *Danny's Cabaret Ltd. v. Horner*, [1980] B.C.J. No. 1293 (QL); *Virden Credit Union Ltd. v. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113; *RoyNat Inc. v. Allan* (1988), 61 Alta. L.R. (2d) 165; *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 14 C.B.R. (3d) 233; *Toronto Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6; *Nicholas v. Anderson* (1996), 40 C.B.R. (3d) 32; *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9; [page129] *Society of Composers, Authors and Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688; *Vanderwoude v. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 195; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

By Deschamps J. (dissenting on the appeal)

Ex parte James, In re Condon (1874), L.R. 9 Ch. App. 609; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160; *L'Heureux (Syndic de)*, [1999] R.J.Q. 945; *Caisse populaire de Pontbriand v. Domaine St-Martin Ltée*, [1992] R.D.I. 417; *Azco Mining Inc. v. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392; *Re Reed* (1980), 34 C.B.R. (N.S.) 83; *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. May/June 397; *Adam v. Daniel Roy Ltée*, [1983] 1 S.C.R. 683; *Man of Aran* (1974), 6 L.A.C. (2d) 238; *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96; *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126; *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138; *Radio CJYQ-930 Ltd.* (1978), 34 di 617; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Hodge v. The Queen* (1883), 9 App. Cas. 117; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *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; *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, 2005 SCC 52; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14; *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92; *Alamo Linen Rentals Ltd. v. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38; [page130] *Beatty Limited Partnership (Re)* (1991), 1 O.R. (3d) 636; *Chastan Ventures Ltd., Re* (1993), 23 C.B.R. (3d) 115; *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208; *McKyes, Re*, 1996 CarswellQue 2575; *Nicholas v. Anderson* (1998), 5 C.B.R. (4th) 256; *Gallo v. Beber* (1998), 7 C.B.R. (4th) 170; *Kearney v. Feldman*, [1998] O.J. No. 5109 (QL); *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160; *Mann v. KPMG Inc.* (2000), 197 Sask. R. 181, 2000 SKQB 460; *Vanderwoude v. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127; *Caswan Environmental Services Inc., Re* (2001), 24 C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77; *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL); *MacLean v. Morash* (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani v. Devgan*, [2005] O.J. No. 2868 (QL); *105497 Ontario Inc. v. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122; *477470 Alberta Ltd., Re* (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430; *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28; *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, aff'd (2004), 46 C.B.R. (4th) 126; *Mancini (Bankrupt) v. Falconi* (1989), 76 C.B.R. (N.S.) 90, aff'd (1993), 61 O.A.C. 332; *Syndicat national de*

l'amiante d'Asbestos inc. v. Jeffrey Mines Inc., [2003] Q.J. No. 264 (QL).

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History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Feldman, MacPherson and Cronk JJ.A.) (2004), 71 O.R. (3d) 54, 238 D.L.R. (4th) 677, 185 O.A.C. 138, 48 C.B.R. (4th) 256, [2004] O.J. No. 1353 (QL), setting aside a decision of Ground J. (2003), 42 C.B.R. (4th) 221, [2003] O.J. No. 1603 (QL). Appeal allowed, Deschamps J. dissenting. Cross-appeal dismissed.

Counsel:

Stephen Wahl and Andrew J. Hatnay, for the appellant/respondent on cross-appeal.

Orestes Pasparakis and Susan E. Rothfels, for the respondent/appellant on cross-appeal.

Benjamin Zarnett and Frederick L. Myers, for the respondent KPMG Inc.

The judgment of McLachlin C.J. and Bastarache, Binnie, LeBel, Fish, Abella and Charron JJ. was delivered by

1 ABELLA J.:-- Bankruptcy suspends the economic independence of an enterprise or individual. No longer can operational choices be made by the owner of a business. These become instead the responsibility of the receiver or trustee appointed by the court to salvage as much of the business's financial remains as possible for the benefit of creditors.

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2 Those creditors include unionized employees. The issue in this appeal is the extent to which the rights of those employees must yield to the overall objective in a bankruptcy of maximizing the ability of creditors to minimize their losses. In particular, the issue is whether those employees are entitled to the same access to a remedy as other stakeholders who attempt to impugn a receiver's or trustee's conduct.

3 The analysis engages both the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A.

4 Three provisions of the *Bankruptcy and Insolvency Act* are engaged by the circumstances of this case. The first is s. 47, authorizing a judge to appoint and supervise an interim receiver to take possession and control of, or otherwise deal with the debtor's property. The second is s. 215, which immunizes the conduct of receivers and trustees from lawsuits unless prior judicial authorization is obtained. The third is s. 72(1), declaring that unless there is a conflict with the Act, any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the federal *Bankruptcy and Insolvency Act*.

5 The relevant provisions of the *Labour Relations Act, 1995* are ss. 69(2), 69(12), 114(1) and 116, the combined effect of which is to give to the Ontario Labour Relations Board exclusive and final authority to determine whether a financial transaction constitutes a sale of a business, thereby triggering the obligation, as a "successor employer", to honour any collective agreements of the acquired business.

6 The issue which animates the interpretive interplay between these provisions is whether to endorse the current judicial approach set out in *Mancini (Bankrupt) v. Falconi* (1993), 61 O.A.C. 332 (C.A.), to determinations under s. 215 of the [page133] *Bankruptcy and Insolvency Act* granting or withholding permission to sue a receiver or trustee.

7 For over a decade, the reigning test for mediating between the protection from litigation for those

administering a bankrupt estate, and the right to sue them for this very administration, has been the one set out in *Mancini*. In essence, the three principles summarized in *Mancini* preclude frivolous, vexatious or manifestly unmeritorious claims from proceeding. For the reasons that follow, unlike the majority in the Court of Appeal, I see no reason to dethrone it and create a higher test to be applied only to claims by employees represented by unions.

I. Background

8 The bankrupt, T.C.T. Logistics Inc., was one of a number of related companies (collectively "TCT") operating a trucking, freight brokerage and warehousing business of high-tech goods in Canada and the United States. TCT operated its warehouse business from several sites, one of which was in Toronto.

9 Forty-two employees at the Toronto warehouse were represented by the Industrial Wood & Allied Workers of Canada, Local 700 ("Union"). On their behalf, the Union entered into a collective agreement with TCT. The term of the agreement was from May 1, 2000 until April 30, 2004.

10 During the course of the collective agreement, TCT became insolvent. GMAC Commercial Credit Corporation -- Canada ("GMAC"), TCT's largest secured creditor, applied under s. 47 of the *Bankruptcy and Insolvency Act* for an order appointing KPMG Inc. ("KPMG") as interim receiver. The Union was not given notice of this application.

11 The order was made on January 24, 2002. It provides for the termination of all employees [page134] "effective immediately", but it also gives KPMG authority to hire or fire any of TCT's employees.

12 The order explicitly states that KPMG's employment-related actions could not be considered those of a "successor employer". The order also prohibits proceedings being taken against the interim receiver unless the court grants leave, and then only if KPMG's solicitor/client costs in such proceedings are secured by court order.

13 The provision at the heart of this litigation is para. 15 of the order, the central provision insulating KPMG from a successor employer designation and more elaborately protecting it from employment obligations arising under either provincial or federal legislation. It states:

> EMPLOYEES
>
> ...
>
> 15. THIS COURT ORDERS that the employment of employees of the Debtors, including employees on maternity leave, disability leave and all other forms of approved absence is hereby terminated effective immediately prior to the appointment of the Receiver. Notwithstanding the appointment of the Receiver or the exercise of any of its powers or the performance of any of its duties hereunder, or the use or employment by the Receiver of any person in connection with its appointment and the performance of its powers and duties hereunder, the Receiver is not and shall not be deemed or considered to be a successor employer, related employer, sponsor or payer with respect to any of the employees of any of the Debtors or any former employees within the meaning of the *Labour Relations Act* (Ontario), the *Employment Standards Act* (Ontario), the *Pension Benefits Act* (Ontario), *Canada Labour Code, Pension Benefits Standards Act* (Canada) or any other provincial, federal, or municipal legislation or common law governing employment or labour standards, (the

> "Labour [page135] Laws") or any other statue [*sic*], regulation or rule of law or equity for any purpose whatsoever, or any collective agreement or other contract between any of the Debtors and any of their present or former employees, or otherwise. In particular, the Receiver shall not be liable to any of the employees of any of the Debtors for any wages (as "wages" are defined in the *Employment Standards Act* (Ontario)), including severance pay, termination pay and vacation pay, except for such wages as the Receiver may specifically agree to pay. The Receiver shall not be liable for an [*sic*] contribution or other payment to any pension or benefit fund.

14 Paragraph 14 of the order is also relevant:

> THIS COURT ORDERS AND DECLARES that nothing in this Order shall constitute the Receiver as the employer of the employees of any of the Debtors and further orders and declares that the appointment of the Receiver will not constitute a sale of the business of any of the Debtors.

15 Pursuant to a further order, KPMG was directed to file an assignment in bankruptcy on behalf of TCT and the related companies. The assignment was filed on February 25, 2002. KPMG was appointed trustee in bankruptcy.

16 KPMG did not give notice to TCT's employees before it had obtained the January 24 order permitting it to terminate their employment. The Union, upon learning about the order, wrote to TCT and KPMG on February 1, 2002 advising them that, in its view, any collective bargaining rights under the Ontario *Labour Relations Act, 1995* remained "operative and in full force and effect".

17 KPMG met with the employees on February 25, advising them that the business would be continuing in order to evaluate potential sales of the warehousing business. KPMG asked the employees for their loyalty and support "to allow us to maximize the enterprise value for all stakeholders".

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18 Subsequently, because of the rapid deterioration of the warehousing business, KPMG sought to sell it as a going concern as quickly as possible. On April 12, KPMG agreed to sell most of the assets of the warehousing business to Spectrum Supply Chain Solutions Inc., a newly formed company.

19 On April 16, KPMG informed the employees about the Spectrum deal and of its intention to seek court approval two days later. An order approving the transaction was obtained on April 18. The closing was scheduled to take place on April 19, 2002.

20 The leasehold interest in the Toronto warehouse was not one of the assets Spectrum purchased. As a result, KPMG decided to wind down its operations and disclaim the lease. It asked Spectrum to manage this process from April 19 until May 23, the date by which KPMG was obliged to vacate the Toronto premises. The resulting management agreement between Spectrum and KPMG entitled Spectrum to any revenues earned during that period in exchange for incurring the costs of winding down the Toronto operation.

21 All unionized employees at the Toronto warehouse were terminated by KPMG on May 9. Some of them were later hired by Spectrum. These hirings were not in accordance with the Union's seniority list.

22 As a result, the Union applied to the Ontario Labour Relations Board on May 13, seeking the following relief under the Ontario *Labour Relations Act, 1995*:

- a declaration that Spectrum was the successor employer to TCT and/or KPMG, and, accordingly, bound by the Union's collective agreement with TCT (under s. 69 of the Act);
- a declaration that TCT and Spectrum were a single employer for labour relations purposes (under s. 1(4) of the Act);
- a declaration of unfair labour practices against TCT and/or KPMG and Spectrum for [page137] entering into an agreement discriminating against unionized employees and eliminating the Union in Spectrum's workforce (under s. 96 of the Act); and
- an order certifying the Union as the exclusive bargaining agent for Spectrum's employees.

23 The underlying premise of the Union's application to the Ontario Labour Relations Board was that Spectrum was incorporated for the sole purpose of acquiring TCT's warehousing business and had colluded with KPMG to operate TCT's business at a different location under substantially the same management. Except for the new location, the only major difference between TCT's operations and those of Spectrum was the absence of the Union. The president of Spectrum had been the vice-president, Warehousing and Logistics, of TCT; several of the warehousing managers of TCT became managers of Spectrum; and Spectrum set up the warehousing operations in its new Toronto location with essentially the same customers as TCT.

24 Relying primarily on s. 215 of the *Bankruptcy and Insolvency Act* which prevents proceedings against an interim receiver or trustee in bankruptcy without leave of the court, KPMG obtained a stay of the Union's application from the Ontario Labour Relations Board.

25 The Union accordingly sought the necessary court approval. In its motion to the bankruptcy judge, it asked for the deletion of those portions of the January 24 order which had declared KPMG's conduct incapable of scrutiny under federal or provincial labour and employment legislation. It also sought to strike the security for costs provision.

26 The bankruptcy judge agreed that the costs requirement was unduly onerous and deleted it ((2003), 42 C.B.R. (4th) 221). He declined, however, to delete that part of the order declaring that the [page138] interim receiver could not be found to be a "successor employer" under the *Labour Relations Act, 1995*.

27 In the course of his analysis, the bankruptcy judge made a number of observations. Since interim receivership orders are designed to enhance the value of the bankrupt estate as much as possible, and since this objective may sometimes best be realized by continuing the operation of a debtor's business pending a sale, the court was entitled to consider the policy implications of exposing interim receivers or trustees to the risk of being successor employers. Moreover, eliminating the risk of an obligation that might otherwise accrue from continuing a business as a going concern offers employees the possibility of employment with a subsequent purchaser.

28 The bankruptcy judge concluded that it would be unduly burdensome on an interim receiver, and incompatible with its duties, to impose the requirements flowing from a successor employer designation on a receiver engaged in such temporary and limited employment relationships.

29 However, applying the "ancillary" or "necessarily incidental" doctrine crafted by Dickson C.J. in

General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641 (refined by Iacobucci J. in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, and by LeBel J. in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31), the bankruptcy judge concluded that the "successor employer provisions" of the order were only "sufficiently integrated" with the legislative scheme of the *Bankruptcy and Insolvency Act* if the interim receiver was carrying on the bankrupt's business for the purpose of an orderly liquidation of the bankrupt's assets or of effecting a sale of the bankrupt's business as a going concern. He relied on Farley J.'s distinction in *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146 (Ont. S.C.J.), [page139] between a receiver (or trustee) acting "*qua* realizer" of the assets and acting "*qua* employer". When acting "*qua* realizer", the receiver was entitled to immunity from successor employer provisions.

30 The bankruptcy judge accordingly amended para. 15 of the order by adding language clarifying that the "successor employer" protection was only valid if KPMG was acting "*qua* realizer" and its conduct was for the purpose of preserving, protecting or liquidating the debtor's assets. The specific language added to the second sentence of para. 15 was:

> for the purpose of preserving, protecting and realizing upon the assets of the Debtors by effecting a sale or sales of the assets or of the business of the Debtors as a going concern or otherwise or for the purpose of effecting an orderly liquidation of the assets of the Debtors.

Since in his view KPMG was carrying on the business as a going concern for these very purposes and acting "*qua* realizer", it was therefore entitled to the protection stipulated in the January 24 order.

31 Turning to s. 215 of the *Bankruptcy and Insolvency Act*, the bankruptcy judge denied the Union leave to bring proceedings against KPMG at the Ontario Labour Relations Board. Since he had concluded that the provisions of the order in relation to KPMG's status as a successor employer were valid as amended, he saw no basis on which leave should be granted to bring a proceeding seeking relief contrary to the terms of the order.

32 On appeal by the Union to the Court of Appeal, there were two issues:

- Did the bankruptcy judge have jurisdiction under s. 47(2) of the *Bankruptcy and Insolvency [page140] Act* to make declarations about successorship?
- Did he err in the exercise of his discretion by denying leave under s. 215 of the Act?

33 The Court of Appeal unanimously concluded that only the labour board had jurisdiction to determine who was a successor employer ((2004), 71 O.R. (3d) 54). Section 47(2) of the *Bankruptcy and Insolvency Act* did not confer on the bankruptcy judge the jurisdiction to make declarations on this issue or to otherwise immunize KPMG from such potential declarations by the labour board. Writing for the court on this issue, Feldman J.A. observed that the federal *Bankruptcy and Insolvency Act* itself explicitly states in s. 72(1) that only provincial laws which conflict with the *Bankruptcy and Insolvency Act* can be abrogated. She did not find in s. 47(2) the authority to declare whether actions taken by KPMG make it a successor employer. Accordingly, she saw no conflict between the authority given to the bankruptcy court under s. 47(2) to supervise an interim receiver, and the successor rights provisions in s. 69(12) of the *Labour Relations Act, 1995*, making a paramountcy analysis unnecessary. As a result, in her view the provincial laws conferring this exclusive jurisdiction on the labour board were unaffected by the *Bankruptcy and Insolvency Act*.

34 Since the bankruptcy judge had no jurisdiction to make *any* determination relating to successor

employer status, the distinction he drew in para. 15 of his January 24 order protecting the interim receiver only when it was acting "*qua* realizer" and not "*qua* employer" of the assets was immaterial.

35 On this basis, the Court of Appeal further amended para. 15 deleting the bankruptcy judge's "*qua* realizer" addition, and adding the following two passages:

[page141]

> ... unless and until an order is made by the OLRB, upon leave of this court under s. 215 of the BIA, declaring the interim receiver a successor employer to the debtors, and subject to the specific terms of any such order, the interim receiver is not obliged to make any payment as a successor employer ... . For clarification, the parties have agreed that if any such amounts become payable by the interim receiver as a successor employer, in no event is the interim receiver to be liable for any amount that either became due or accrued prior to the date of its appointment.

36 The court divided, however, on the bankruptcy judge's approach to and resolution of the Union's application for leave to bring labour board proceedings. The disagreement was over the test under s. 215 of the *Bankruptcy and Insolvency Act* for granting leave to bring successor employer applications. Feldman J.A., whose analysis was endorsed in separate concurring reasons by Cronk J.A., was of the view that the traditional *Mancini* test represented too low a threshold when the proposed proceedings were successor employer applications. In her view, an approach was required that took more account of the impact of such litigation on the bankruptcy process.

37 The revised test proposed by Feldman J.A. added factors such as the complexity of the receivership; the availability of suitable purchasers; the potential duration of the receiver's operation of the business pending a sale; any arrangements the receiver has made with the Union to accommodate the employees; the likelihood that a subsequent purchaser will be declared a successor employer bound by the obligations under the collective agreement; and the timeliness of the labour board hearing relative to the receiver's temporary operation and ultimate sale of the business.

38 Feldman J.A. concluded that the bankruptcy judge was obliged not to determine the issue itself, but to determine whether a *prima facie* case of [page142] successor employer status had been made out, and, based on the factors she enumerated, to decide whether to grant leave. She accordingly set aside his refusal to grant leave and remitted the leave application back to him for reconsideration based on her enumerated factors.

39 In dissent, MacPherson J.A. saw no basis for erecting a higher threshold for granting leave when the application was for successor employer applications. Other creditors' applications for leave to bring proceedings under s. 215 are usually determined in accordance with the *Mancini* test, the applicability of which had been consistently upheld by the Ontario Court of Appeal, most recently in *Royal Crest Lifecare Group Inc., Re* (2004), 46 C.B.R. (4th) 126. In his view, by formulating what he characterized as a "more vague and more elaborate" (para. 111) test uniquely for successor employer leave applications, the majority was inviting a bankruptcy court to do indirectly through s. 215 what it had decided, correctly in his view, could not be done under s. 47(2), namely, insulate the receiver from successor employer determinations.

40 Applying the test in *Mancini*, MacPherson J.A. concluded that the bankruptcy judge had erred in refusing to grant leave to the Union to bring successor employer and unfair labour practice proceedings against KPMG. His remedy, accordingly, would have been to grant leave to the Union to proceed with

its application before the labour board.

41 The Union appealed the Court of Appeal's order denying leave to bring its successorship proceedings before the labour board, and disputed the majority's conclusion that the *Mancini* test set too low a bar for granting leave to bring proceedings before the labour board. The Union also sought to have the Court of Appeal's amended version of para. 15 set aside to the extent that it continues to [page143] make declarations with respect to successorship rights.

42 GMAC cross-appealed the Court of Appeal's amendments to para. 15, taking issue with the court's unanimous conclusion that a bankruptcy judge lacks jurisdiction to declare whether a receiver is a successor employer under the *Labour Relations Act, 1995*.

II. Analysis

A. *Can a Bankruptcy Court Judge Determine Successor Rights Issues?*

43 The first issue decided by the Court of Appeal, and raised in the cross-appeal, relates to whether the bankruptcy court has jurisdiction to decide whether an interim receiver is a successor employer within the meaning of the *Labour Relations Act, 1995*. The unanimous conclusion of the Court of Appeal was that it had no such jurisdiction. I agree.

44 The bankruptcy court's authority to supervise the interim receiver is found in s. 47(2) of the *Bankruptcy and Insolvency Act*, which states:

> **47.** ...
>
> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (*a*) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (*b*) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (*c*) take such other action as the court considers advisable.

45 These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. [page144] The powers given to the bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

46 Any doubt about whether s. 47(2) was intended to dispense such jurisdictional largesse vanishes when it is read in conjunction with s. 72(1) of the *Bankruptcy and Insolvency Act*, which states:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

47 The effect of s. 72(1) is that the *Bankruptcy and Insolvency Act* is not intended to extinguish legally protected rights unless those rights are in conflict with the *Bankruptcy and Insolvency Act*. The right in issue here is the right found in s. 69 of the Ontario *Labour Relations Act, 1995* to seek a declaration that a subsequent employer is bound by the employment obligations found in the collective agreements of its predecessor. I agree with Feldman J.A. who concluded:

> ... the first half of [s. 72] clearly states that the *BIA* will not abrogate or supercede any provincial law unless that law is in conflict with the *BIA*. The language of s. 47(2) of the *BIA* does not conflict with the successor employer sections of the *LRA* and therefore does not abrogate or supercede that Act. [para. 30]

48 Section 114(1) of the *Labour Relations Act, 1995* states:

[page145]

> **114.** (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

49 This means the labour board has exclusive jurisdiction to make a successor employer determination. It is difficult to see how the right to seek such a declaration conflicts in any way with the bankruptcy court's authority under s. 47(2) to direct and supervise the interim receiver's effective management of the debtor's assets.

50 Trustees, receivers and the specialized courts by which they are supervised, are entitled to a measure of deference consistent with their undisputed expertise in the effective management of a bankruptcy. Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the *Bankruptcy and Insolvency Act*.

51 If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(*c*). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72. As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3:

> ... explicit statutory language is required to divest persons of rights they otherwise enjoy at law... . [S]o long as the doctrine of paramountcy is not triggered, [page146] federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

The language of s. 47(2) falls well short of this standard. The bankruptcy court can undoubtedly mandate employment-related conduct by the receiver, but as s. 47(2) of the *Bankruptcy and Insolvency Act* is presently worded, the court cannot, on its own, abrogate the right to seek relief at the labour

board.

52 Accordingly, the Court of Appeal was correct to conclude that the bankruptcy judge had no jurisdiction to make a declaration about or immunize the receiver from successor employer liability. To the extent that any provision of the order does so, including the amendments added by the Court of Appeal, they should be set aside.

B. *Is a Unique Test Required Under Section 215 for Leave to Bring Successor Rights Applications?*

53 Having concluded that the bankruptcy judge has no jurisdiction either to make a determination as to the receiver's status as a successor employer, or to immunize it from such a determination by the labour board, the remaining issue is whether to set aside the bankruptcy judge's refusal to permit the Union remedial access to the Ontario Labour Relations Board.

54 The debate between the parties is over the extent of the bankruptcy court's discretion when leave is sought by a union to bring a successor employer application against the receiver or trustee. This shifts the focus to s. 215 of the *Bankruptcy and Insolvency Act*, which states:

> **215.** Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any [page147] report made under, or any action taken pursuant to, this Act.

55 For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact. As L. W. Houlden, G. B. Morawetz and J. Sarra stated in *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 3, at p. 7-118.2:

> The court will not refuse leave unless there is no foundation for the claim or the claim is frivolous and vexatious ... .

56 Essentially, unless the claim is without merit, the gate to a litigated determination has usually been opened under s. 215 and its statutory predecessors: see *Randfield v. Randfield* (1861), 3 De G. F. & J. 766, 45 E.R. 1075, at p. 1077, *per* Turner L.J. ("... it is not, as I apprehend, according to the course of the Court, to refuse liberty to try a right which is claimed against its receiver, unless it is perfectly clear that there is no foundation for the claim"); *In re Diehl v. Carritt* (1907), 15 O.L.R. 202 (H.C.J.), at p. 204; *Danny's Cabaret Ltd. v. Horner*, [1980] B.C.J. No. 1293 (QL) (C.A.); *Virden Credit Union Ltd. v. Dunwoody Ltd.* (1982), 45 C.B.R. (N.S.) 84 (Man. Q.B.), at p. 90; *Re New Alger Mines Ltd.* (1986), 59 C.B.R. (N.S.) 113 (Ont. C.A.); *RoyNat Inc. v. Allan* (1988), 61 Alta. L.R. (2d) 165 (Q.B.); *B.N.R. Holdings Ltd. v. Royal Bank* (1992), 14 C.B.R. (3d) 233 (B.C.S.C.); *Toronto Dominion Bank v. Alex L. Clark Ltd.* (1993), 22 C.B.R. (3d) 6 (Ont. Ct. (Gen. Div.)), at para. 7; *Nicholas v. Anderson* (1996), 40 C.B.R. (3d) 32 (Ont. Ct. (Gen. Div.)), at paras. 13-15; *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9 (Ont. S.C.J.), at para. 13; *Society of Composers, Authors and Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (C.A.), at para. 2; *Vanderwoude v. Scott and Pichelli Ltd.* (2001), 143 O.A.C. 195, at para. 22; *Bennett on Bankruptcy* (8th ed. 2005), at pp. 416-17; *Bennett on Receiverships* (2nd ed. 1999), at p. 223; and Houlden, Morawetz and Sarra, at p. 7-118.2.

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57 In the leading case of *Mancini*, the Court of Appeal summarized the accepted principles as being the following:

> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

58 The court in *Mancini* explained that the duty of the trustee is to protect both the creditors and the public interest in the proper administration of the bankrupt estate. The gatekeeping purpose of the leave requirement, therefore, in light of this duty, is to prevent the trustee or receiver "from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action" (para. 17) so that the bankruptcy process is not made unworkable. On the other hand, it ensures that legitimate claims can be advanced.

59 The question under s. 215 is whether the evidence provides the required support for the cause of action sought to be asserted. As Blair J. observed in *Nicholas*:

> The question ... is whether, in the circumstances of this case, the facts in support of the proposed claim have been disclosed by sufficient affidavit evidence to ensure the claim's proper factual foundation, having regard to the policy of requiring leave in order to protect a trustee from claims which have no basis in fact. [para. 16]

In other words, the evidence must disclose a *prima facie* case.

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60 Although the *Mancini* test calls for an investigation into whether the proposed litigation discloses a cause of action, the focus of that inquiry is not a determination of the merits. This is a particularly important observation in circumstances where exclusive jurisdiction to decide the legal questions raised in the proceedings resides elsewhere. As the court said in *Mancini*, at para. 16 "[o]n a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under [the predecessor of s. 215] must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action." See also *Society of Composers, Authors and Music Publishers of Canada*, at para. 2.

61 This threshold strikes the appropriate balance between the protection of trustees and receivers from the distraction and delay inherent in frivolous or merely tactical suits, and the preservation to the maximum extent possible of the rights of creditors and others as against a trustee or receiver. In this way, *Mancini* is consistent with *Crystalline*'s requirement that there be "explicit statutory language" (para. 43) before the *Bankruptcy and Insolvency Act* is interpreted so as to deprive persons of rights conferred under provincial law.

62 The approach proposed by the majority in the Court of Appeal would require that courts consider the effect of the proposed proceeding on, among other considerations, the potential for interference with

the maximization of stakeholder value. With respect, the result of the application of this higher threshold would necessarily bar some meritorious cases on the basis that other stakeholders would be better off. To allow bankruptcy courts to use the leave requirement in s. 215 to pick and choose between stakeholders' claims on the basis of a standard which, as MacPherson J.A. noted, at para. 111, is both "more vague and more elaborate" than that set out in *Mancini*, would be a profound [page150] departure from the principles in *Crystalline*. The integrity and efficiency of the bankruptcy process are sufficiently advanced by directing bankruptcy courts to deny leave to frivolous and merely tactical suits.

63 A more interventionist approach is premised on the "single control" theory of bankruptcy litigation. In *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92, a case dealing with the enforceability of bankruptcy court orders across Canada, Binnie J. described the goal of a single court controlling all aspects of a bankruptcy, including litigation, as being "the expeditious, efficient and economical clean-up of the aftermath of a financial collapse" (para. 27). The benefits of avoiding multiple proceedings in multiple provinces underlay the decision. But, as Binnie J. also observed, "[s]ingle control is not necessarily inconsistent with transferring particular disputes elsewhere" (para. 76).

64 "[T]ransferring particular disputes elsewhere" is all that is done when leave under s. 215 is granted. Moreover, I note that the "transfer" in the instant case consists only of permitting the tribunal vested with exclusive jurisdiction over the matter to ultimately decide it. It is one thing to avoid permitting provincial enforcement schemes to defeat legitimate bankruptcy orders, as was held in *Sam Lévy*, it is another to use the bankruptcy process to defeat legitimate assertions of provincially granted rights, including labour and employment rights over which the bankruptcy court has no jurisdiction. The *Mancini* test is not, in short, inconsistent with "single control".

[page151]

65 Ultimately, the appropriate test under s. 215 of the *Bankruptcy and Insolvency Act* remains a question of statutory interpretation, and the Act itself provides important context for the resolution of that question. I think it is instructive that s. 37 of the *Bankruptcy and Insolvency Act* provides that when the bankrupt, any creditor, or any other person is aggrieved by an act or decision of a trustee or receiver in the administration of the bankrupt estate, he or she may apply to the bankruptcy court. The court may then reverse, modify or confirm the act or decision complained of, making such order as it thinks just. No leave is required under s. 37.

66 Sections 37 and 215 have been called alternative means of proceeding against a trustee or receiver: see *Virden Credit Union*, at pp. 89-90. The difference, of course, is that under s. 215, permission can be sought to seek a remedy elsewhere than in the bankruptcy court, and certain claims will be beyond the jurisdiction of the bankruptcy court under s. 37. Nevertheless, many actions that may be brought with leave under s. 215 may also be heard in the bankruptcy court on a s. 37 application. What is instructive about s. 37, however, is that it demonstrates that Parliament did not consider it appropriate to immunize court-appointed officers from litigation.

67 On the other hand, where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly, as in s. 14.06(1.2) (trustee immune from certain liabilities arising from continuing the debtor's business or the employment of the debtor's employees); s. 14.06(4) (trustee immune in certain circumstances from environmental liabilities); s. 41(8) (discharge of liability of trustee upon discharge of trustee); ss. 50(9) and 50.4(5) (trustee not liable for detrimental reliance on cash-flow statements if the trustee reviews the statements reasonably and in good faith); s. 80 (trustee

not liable for losses resulting from seizure of [page152] property); s. 148(3) (no action for a dividend lies against a trustee); s. 171(6) (trustee not liable for reasonable and good faith statement of opinion as to the probable cause of the bankruptcy); s. 197(3) (trustee not liable for costs of a proceeding); s. 251 (no action against a receiver for loss resulting from notice of the receiver's appointment); and s. 252 (no action against a receiver for failure to comply with the Act where the receiver reasonably believed the debtor was not insolvent).

68 In the absence of such express protection, the bankruptcy court should not convert the leave mechanism in s. 215 into blanket insulation for court-appointed officers.

69 The issue then becomes whether there is some reason why the long-standing principles governing the granting of leave should be different when the dispute relates to the receiver's obligations to the debtors' employees represented by a union.

70 The argument for a higher, more elaborate threshold advanced by the majority in the Court of Appeal is to enhance the receiver's ability to decide how and when to sell the assets, free from the fear of subsequent scrutiny for labour relations violations. The *Mancini* test does not in any way interfere with the protections that Parliament has deemed necessary to preserve the ability of trustees and receivers to discharge their duties flexibly and efficiently. If the argument is that the receiver should be protected from the threat of litigation by the Union because of its inevitable cost, delay and inconvenience, then no creditor should ever be granted leave to sue. No litigation is without delay, cost and inconvenience. But Parliament has nonetheless decided, through s. 215, that the bankruptcy court should, in its discretion, permit litigation against court-appointed officers. It has made no distinction between unions and other [page153] creditors in granting this discretionary authority and none should be imputed.

71 To impose a higher s. 215 threshold when it is a labour board issue is to read into the *Bankruptcy and Insolvency Act* a lower tolerance for the rights of employees represented by unions than for other creditors. I see nothing in the Act that suggests this dichotomy.

72 A hierarchical approach to s. 215 which makes it significantly more difficult for a successorship case to obtain leave would unduly give trustees and receivers more protection from being answerable to the court for possible misconduct related to potential breaches of labour relations, and offers unique and enhanced protection for trustees who violate labour rights. It is, moreover, an approach that undermines the protection of rights endorsed by this Court in *Crystalline*. As Borins J.A. of the Ontario Court of Appeal observed in *Royal Crest*:

> While the important role performed by bankruptcy trustees is deserving of protection, the rights of labour unions to pursue legitimate issues on behalf of their members must also be respected. [para. 70]

73 The Court of Appeal unanimously -- and correctly -- reached the conclusion that the bankruptcy court cannot make declarations about, or immunize court-appointed officers from accountability for contraventions of applicable labour relations laws. Yet, the majority's proposed threshold for leave under s. 215 would not only upset the balance in the Act between the gate-keeper function of the bankruptcy court and protected property and civil rights, it would create a real risk that s. 215 would become a *de facto* means by which the [page154] bankruptcy court could make such declarations, and, contrary to *Mancini*, effectively decide the issue on its merits. That is what happened at first instance in this case. As MacPherson J.A. observed in his dissent:

> In short, and with respect, my colleague introduces through the side door of s. 215 (a leave provision, not a provision conferring authority on the receiver) precisely what she correctly does not permit the receiver to do through the front door of s. 47(2).

[para. 115]

74 Section 215 is not designed to protect the trustee from well-founded litigation. It is designed to afford protection from claims for which there is no factual foundation. All major stakeholders, on a plain reading of the statute, have been given similar access for remedying alleged grievances against the trustee under ss. 37 and 215. Absent a statutory intention to the contrary, this symmetry should continue, whatever the identity of the stakeholder. There is no reason to depart from it when what is sought is relief from the labour board rather than from a bankruptcy judge.

75 That brings us to the proposed action in this case, namely a successor rights application before the labour board. Various provincial statutes provide that the successor employer is bound by the collective agreement and required to recognize the exclusive representation of the employees by their union. The statutes declare that the collective agreement is binding if the business has been sold or otherwise transferred to the successor until the tribunal otherwise declares.

76 In *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, Wilson J., in her dissenting reasons, explained that the purpose of the "successor rights" [page155] provisions in labour legislation is "to prevent the loss of union protection by employees whose company's business is sold or transferred" (p. 652). A successor employer is defined in s. 69(2) of the Ontario *Labour Relations Act, 1995* as someone who acquires a business by sale or transfer from an employer and is bound by any existing collective agreements until the Ontario Labour Relations Board rules otherwise.

77 To be found to be a successor employer, as McLachlin J. noted for the majority in *Lester*, a labour board must first determine whether a discernable part of the business was disposed of. This requires an examination of "the nature of the predecessor business, and the nature of the successor business" (p. 676) to determine whether the business of the predecessor is being performed by the successor. Relevant factors include the work covered by the terms of the collective agreement, the type of assets transferred, whether employees are transferred, and whether there is continuity of management or of the work performed. In each case, as McLachlin J. pointed out, the labour relations board must determine "if, within the business context in which the transaction occurred, it can reasonably be said on the factors present that the business or part of the business has been transferred from the predecessor to the successor" (p. 677).

78 KPMG and GMAC make a number of arguments directed specifically at the obstacles to the Union's successorship claim, including a constitutional paramountcy argument relating to the effect of a successor employer declaration on the priority scheme in the *Bankruptcy and Insolvency Act*. These are matters for the labour board's consideration. They are not germane to whether leave should be granted. And I appreciate the majority of the Court of Appeal's concern that the possibility of subsequent labour relations scrutiny may have an impact on a receiver's decision about how best to maximize stakeholder value. But again, this [page156] goes not to whether leave should be granted, but is a consideration in deciding the merits of the successor rights application. Issues of successorship are within the exclusive jurisdiction of the labour relations board. The labour board has been given exclusive responsibility for deciding these issues because the provincial legislature has confidence in its ability to do so in the public interest, based not only on the expectations of employees, but on those of employers as well.

79 In this case, the Union sought to argue before the Ontario Labour Relations Board that the interim receiver became the employer of the employees after its appointment when it decided to employ them in order to continue operating the warehouse. As an employer, it would be obliged to abide by the collective agreement and applicable labour and employment statutes. The Union alleged it failed to do so by, among other acts, manipulating the sale agreement so that the Union was ousted from the purchaser's workforce.

80 It is by no means clear how the Board will deal with a particular successorship issue, since the outcome will be determined by the facts. But where, as here, it cannot be said that the Union's claim is frivolous or without an evidentiary foundation, it should be allowed to proceed.

81 A postscript: No notice of the motion appointing an interim receiver was given to the Union, the exclusive bargaining agent of the employees. I appreciate that what happened in this case is not uncommon: receivers routinely seek an *ex parte* order from the bankruptcy judge with a draft order agreed upon by the debtor corporation and major creditors. Unions, as in this case, receive no notice, thereby losing the opportunity at the earliest possible stage to participate in the formulation of the plan for dealing with the debtor's assets. Notice is [page157] no guarantee either of cooperation or resolution, but, arguably, a union shut out of the process early will eventually, like any major creditor, likely seek to protect its interests. As Iacobucci J. observed in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701:

> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result ... . [para. 95]

82 While advance negotiations with unions on important decisions may not eliminate a subsequent claim for successor employer liability, they could potentially yield a greater possibility for resolution than ignoring them would. Optimally, advance discussions about the impact on employees if the business is continued will lead to compromise rather than litigation.

83 This would have resulted, in this case, in the immediate integration of a significantly affected party into the development and supervision of the orderly, fair and effective management of the insolvency process. It would not, of course, necessarily have avoided a multiplicity of proceedings. Nor would it have guaranteed the Union's blessing of the proposed methodology for preserving and realizing the assets. But it would have, at the very least, ensured that its legitimate concerns were factored into the planning at an early enough stage, thereby possibly avoiding later proceedings such as those which arose in this case.

III. Disposition

84 I would allow the appeal with costs throughout, grant leave to the Union to bring its proceeding [page158] before the labour board, and set aside those parts of the order that make a declaration about, or immunize the receiver from, successor employer liability. I would dismiss the cross-appeal with costs.

English version of the reasons delivered by

85 DESCHAMPS J. (dissenting on the appeal):-- What factors guide a bankruptcy judge when hearing an application for leave to bring proceedings against a trustee? That is the main issue in this case. To resolve it, however, the Court must consider the limits on the application of provincial law in bankruptcy matters. For the reasons that follow, I am of the view that a judge who decides an application under s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), must do so in a manner consistent with federal and provincial heads of power so as to avoid any constitutional conflicts. I would therefore affirm the Court of Appeal's judgment ((2004), 71 O.R. (3d) 54) remitting the case to the Superior Court of Justice for reconsideration in light of the principles set out below.

86 I have read the reasons of Abella J. She concludes (at para. 78) that it is the Ontario Labour

Relations Board ("OLRB") that must decide the constitutional question. In my view, the *BIA* provides for a step that is specifically designed to avoid any constitutional conflicts, and the administrative tribunal should not be allowed to make an unconstitutional declaration. Thus, we disagree as to the forum that should hear and determine the conflict issue. A superior court judge presiding over a bankruptcy case acts as a specialized tribunal. He or she is very familiar with the duties and responsibilities of trustees and serves as the initial jurisdiction to which someone wanting to bring proceedings against a trustee must apply. I propose that the application for leave to bring proceedings pursuant to s. 215 *BIA* be analysed based on the actual effect of the proceedings on the duties and responsibilities of the trustee as set out in the *BIA*. Such an analysis is the only way to [page159] guarantee compliance with the principles of constitutional law.

87 In order to assess the areas of conflict between the *BIA* and the provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A ("*LRA*"), concerning successor employers, it will be helpful to begin by briefly reviewing the trustee's role in the context of the 1992 reform of the bankruptcy scheme. I will then discuss the effect of successor employer declarations made by the OLRB before turning to the constitutional principles applicable in the event of conflict. I will conclude by identifying the specific criteria for avoiding conflicts and then making a few comments on the case before the Court.

1. Powers and Responsibilities of the Trustee

1.1 *Role of the Trustee*

88 Viewed generally, the administration of a bankruptcy is straightforward. The trustee receives the assets in one hand, then settles any claims with the other using the proceeds of realization of the assets. In concrete terms, the trustee, in performing these functions, plays an active role in the liquidation of the bankrupt's estate. The trustee's duties and responsibilities are explicitly governed by the *BIA*. The bankrupt's property vests in the trustee (s. 71). The trustee's powers with respect to the property are set out in the *BIA* (ss. 30 and 31). Subject to the rights of secured creditors and certain other exceptions, the remedies of all the creditors are stayed (s. 69.1). The *BIA* also governs the nature of provable claims and the claims procedure (s. 121). A trustee who carries on the bankrupt's business or continues the employment of the bankrupt's employees is not personally liable for any claims arising before the bankruptcy (s. 14.06(1.2)). However, trustees are authorized to settle such claims out of the assets vested in them (s. 67) by distributing the proceeds of realization of the assets in accordance with the *BIA*, based on the priority of payment for which that Act provides (ss. 136 to 147).

89 The trustee is, first and foremost, an officer of the court:

[page160]

> ... and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors.

(*Ex parte James, In re Condon* (1874), L.R. 9 Ch. App. 609, at p. 614)

90 The basis for the trustee's long-recognized role as an officer of the court is found in s. 16(4) *BIA*; under the *BIA*, the trustee has the same status as the interim receiver: *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (H.L.), at p. 167; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (3rd ed. (loose-leaf)), vol. 1, at C[s]10 and C[s]44. This status obliges the trustee to act equitably and prudently, to cooperate with the court and, in a more general manner, to contribute to the proper administration of justice (*L'Heureux (Syndic de)*, [1999] R.J.Q. 945 (C.A.), at p.

949; *Caisse populaire de Pontbriand v. Domaine St-Martin Ltée*, [1992] R.D.I. 417 (C.A.); *Azco Mining Inc. v. Sam Lévy & Associés Inc.*, [2000] R.J.Q. 392 (C.A.); *Re Reed* (1980), 34 C.B.R. (N.S.) 83 (Ont. C.A.); J. Auger and A. Bohémier, "The Status of the Trustee in Bankruptcy" (2003), 37 R.J.T. 57, at pp. 99-100).

91 The *BIA* protects trustees while they are acting as officers of the court and exercising the powers conferred upon them by law. A trustee is not personally bound by the bankrupt's obligations. In addition to being protected by the provisions that confer immunity upon them (ss. 14.06(1.2), (2) and (4), 50(9) and 50.4(5)), trustees benefit from the screening of the proceedings provided for in s. 215, which is central to the litigation in the case at bar. The provisions that protect trustees against proceedings are a clear indication of Parliament's intent to give trustees the flexibility they need to discharge the duties imposed on them by the *BIA*.

92 It is also interesting to note that similar protections exist for monitors appointed under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11.7(4) and 11.8(1), (3) and (5), and liquidators acting pursuant to the [page161] *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, ss. 35.1 and 76(2).

1.2 *1992 Reform*

93 The rules governing bankruptcy changed considerably with the coming into force of the 1992 reform. The most striking change was the priority given to the reorganization of companies, as opposed to the interruption of business. D. C. A. Tay comments as follows on the significance of the *BIA*'s new thrust:

> The main impact of the *BIA* is to change the thrust of Canada's bankruptcy legislation from liquidation to rehabilitation. Whereas the old Act dealt primarily with who gets what from the remains of the bankrupt's estate, the *BIA* tries to provide more ways for an insolvent debtor to stay alive and to restructure and reorganize its affairs.
>
> (*Implications of the New Bankruptcy and Insolvency Act* (1993), article VI, "The *Bankruptcy and Insolvency Act*: Striking a Balance Between the Rights of the Debtor and its Creditors", at p. 2)

94 This change is fundamental, and it unquestionably constitutes one of the main objectives behind the reform. Its effect, in concrete terms, in the case at bar is that the trustee was obliged to facilitate the sale of a going concern rather than to cease operations and liquidate the assets. The objective of continuing operations is a factor that must be incorporated into the constitutional analysis when considering whether a provincial statute frustrates the purpose of the *BIA*.

95 The trustee's duties and responsibilities as a public officer permeate these new functions. The trustee has been transformed from a mere liquidator into an agent of financial restructuring. If trustees are responsible for ensuring that businesses survive and that jobs are preserved, then it follows that they must manage the businesses until purchasers can be found. The trustee's management role is essentially a temporary one. Although the length of [page162] the trustee's administration may vary depending on the nature of the business and the economic conditions at the time, the trustee serves essentially as a bridge in maintaining or reorganizing the business before handing it over to a purchaser.

96 It is clear from this crucial role of the trustee that bankruptcy inevitably has consequences for labour relations, which is why it is important to review the interrelationship of the rules of bankruptcy and those of labour relations, more specifically those applicable to the successor employer declaration.

2. Purpose and Effect of the Successor Employer Declaration

2.1 *Purpose of the Declaration*

97 Every Canadian legislature has enacted a provision pursuant to which employees' union protection remains in effect should the business they work for be transferred. The Ontario provision that is relevant to the instant case reads as follows:

> **69.** ...
>
> (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

98 Without this protection, employees could, although still working at the same jobs, albeit for a new employer, be stripped of the rights their union had negotiated on their behalf.

99 In *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, [page163] McLachlin J., as she then was, explained the purpose of the successor employer declaration as follows:

> The basic aim of such provisions is to prevent employees from losing union protection when a business is sold or transferred or when changes are made to the corporate structure of a business... . [p. 671]

100 Numerous factors are taken into consideration when establishing whether the purchaser of a business has succeeded to the vendor as employer. To determine whether the business has been transferred, the usual practice is to ask whether sufficient significant elements of its assets have been sold to the purchaser and assess the degree of continuity in the business's operations. Each case turns on its own facts, and no single factor is determinative. The decision maker may compare both the human aspects (employee know-how, management system, licences, patents, goodwill) and physical aspects (tangible assets of the business, equipment, land, location) of the assigned business with those of the new one to decide whether there has been a sale. The decision maker also determines whether the constituent parts of the business have been transferred as a whole that is sufficiently coherent for the transfer to be equivalent to the sale of the business as a "functional economic vehicle" and for the survival of the rights arising out of collective bargaining to be justified (*Lester*, at p. 676; *Metropolitan Parking Inc.*, [1980] 1 Can. L.R.B.R. 197 (Ont.), at p. 208; *Lincoln Hydro Electric Commission*, [1999] O.L.R.B. Rep. May/June 397, at pp. 415-16; G. W. Adams, *Canadian Labour Law* (2nd ed. (looseleaf)), at pp. 8-4 to 8-23).

2.2 *Effect of the Declaration*

101 The effect of a declaration by the OLRB that an entity has succeeded to another as an employer is that the entity in respect of which the declaration is made becomes a party to the collective agreement and becomes liable to perform all the obligations set out in that agreement, including those that were binding on the former employer before the business was transferred. The new employer becomes

personally liable for the predecessor employer's [page164] debts, as well as for any violations of the collective agreement occurring before the sale. For example, the successor may be bound by an arbitration award against the predecessor and be forced to assume responsibility for unfair labour practices. Generally speaking, the successor is personally liable to perform the predecessor's obligations (*Adam v. Daniel Roy Ltée*, [1983] 1 S.C.R. 683, at pp. 694-95; *Man of Aran* (1974), 6 L.A.C. (2d) 238 (Ont.); *Woodbridge Hotel* (1976), 13 L.A.C. (2d) 96 (Ont.); *Uncle Ben's Industries*, [1979] 2 Can. L.R.B.R. 126 (B.C.); *Re United Brotherhood of Carpenters & Joiners of America, Local 3054 and Cassin-Remco Ltd.* (1979), 105 D.L.R. (3d) 138 (Ont. H.C.J.); *Radio CJYQ-930 Ltd.* (1978), 34 di 617; Adams, at pp. 8-38.2 to 8-39; D. D. Carter, G. England, B. Etherington and G. Trudeau, *Labour Law in Canada* (5th ed. 2002), at pp. 280-81).

102 Although protecting employees upon the sale of a business is straightforward in the context of the transfer of obligations to the purchaser, a number of questions are raised when the issue arises in a situation involving a trustee. The difficulties faced by trustees are exacerbated by a lack of uniformity both in labour relations legislation across Canada and in the case law relating to that legislation (Adams, at pp. 8-4 *et seq*. and 8-39 *et seq*.).

103 It is common ground that the *LRA* confers the exclusive power to decide who is a "successor employer" on the OLRB. However, since the Ontario statute cannot frustrate the purpose of the *BIA*, it is necessary to determine to what extent a declaration that a trustee is a successor employer is compatible with the *BIA*.

3. Conflicts Between the *BIA* and the *LRA*

104 I have already discussed the effect of a successor employer declaration made under the *LRA*. Section 69(2) *LRA* provides that the purchaser of the business is bound by the obligations of the employer-vendor who signed the collective agreement as if the purchaser had been a party to that agreement. I [page165] also mentioned above that a declaration that a trustee is an employer within the meaning of the *LRA* would raise a number of questions. Even a cursory review brings a number of conflicts to light.

105 The most obvious conflict results from claims for unpaid wages. The effect of a successor employer declaration is that the person to whom it applies is liable for the obligations of the employer who signed the collective agreement. The new "employer", the trustee in the case at bar, would be liable for all wages left unpaid by the bankrupt. This obligation is in direct conflict with two provisions of the *BIA*.

106 The first is s. 14.06(1.2), which explicitly provides as follows:

> (1.2) Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.

As the declaration binds the trustee to perform all the obligations of the employer who signed the collective agreement, its effect is to impose on this officer of the court a personal liability from which he or she is explicitly exempted by s. 14.06(1.2).

107 The second incompatible provision is s. 136(1)(*d*), which gives priority to claims of the bankrupt's employees for up to six months' back pay, to a maximum of $2,000 per employee. Any

claims in excess of this amount are treated as ordinary claims and paid rateably (s. 141). If the trustee is considered to be an employer, he or she must pay the employees' claims in full, which is inconsistent with the *BIA*. This is another situation in which there is a direct conflict because it is impossible to comply with both the *BIA* and the *LRA*. Although not all bankrupt employers accumulate debts for back pay in excess of the limits provided for in the *BIA*, when one does, the bankruptcy court cannot unconditionally allow a union [page166] to request that the trustee be declared the bankrupt's successor.

108 Another conflict may arise in situations similar to the one in *Adam v. Daniel Roy Ltée*. In that case, the new employer was ordered to reinstate and indemnify an employee who had been dismissed by the predecessor employer because of her union activities. Such a decision, if applied to a trustee, would require the trustee to reinstate an employee even though the bankruptcy had, in principle, terminated his or her employment (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27).

109 Other conflict situations are more subtle. One example is where a trustee must continue operating a business with only a few remaining employees. Procedures relating to lay-offs or to relocation may impose constraints that are incompatible with reorganization for bankruptcy purposes.

110 A final conflict results from the fact that the successor employer declaration is not time-limited. In the case of an actual purchaser, this poses no problems. In principle, the transfer of the business, like the declaration, is final. The same is not true in the case of a trustee, since the trustee, as an officer of the court, is entitled to be discharged once the administration of the assets has been completed (s. 41(2) *BIA*). An unconditional declaration would make the trustee an employer even though the reorganization has been completed and the trustee has been discharged by the bankruptcy court.

111 The above examples clearly illustrate that the successor employer declaration is not free of pitfalls when it applies to a trustee who must discharge his or her duties in accordance with the *BIA*. If in my first example it is clearly impossible to apply the two statutes concurrently, a situation in which the trustee could be held personally liable for debts of the bankrupt connected with the collective agreement would just as obviously frustrate the purpose [page167] of the *BIA*. As Feldman J.A. stated in the instant case:

> These bankruptcy considerations are critically important where an interim receiver could be declared a successor employer of the debtor if it carries on the debtor's business in order to sell it as a going concern. Whether to carry on the business is one of the most significant decisions that the receiver must make. That decision affects the entire direction of the bankruptcy and its outcome and, importantly, the ability of the receiver to maximize the value of the bankrupt's estate for the benefit of the affected stakeholders. [para. 53]

112 The decision to continue operating the business is central to the trustee's role under the *BIA*. This role cannot be disregarded. The parties must strike a balance between the trustee's duties and immunities under the *BIA* and the employees' rights under the *LRA*. In the event of conflict, the parties must refer to constitutional principles. A brief review of the relevant doctrines is therefore in order.

4. Double Aspect and Paramountcy Doctrines

113 Conflicts of legislative powers are not tolerated in constitutional law. A number of doctrines have been developed to ensure that federal and provincial powers are respected. Two of them are relevant here: double aspect and paramountcy. The doctrine of paramountcy has been considered in a number of this Court's decisions dealing specifically with bankruptcy, and it would be helpful to summarize those decisions.

4.1 *Double Aspect Doctrine*

114 Provincial legislatures have jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867* (the "Constitution"). The regulation of conditions of employment falls under this head of power. No one is questioning the constitutionality either of the *LRA* as a whole or of s. 69(2). As for Parliament, it has jurisdiction over bankruptcy and insolvency under s. 91(21) of the Constitution, and neither its jurisdiction nor the [page168] provisions granting powers and immunities to trustees are being contested. Thus, each of these statutes, in its own field, is within the jurisdiction of the level of government that enacted it.

115 When effect is given to federal and provincial statutes, they can often be applied concurrently. The Privy Council recognized this possibility at a very early stage:

> ... subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

(*Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 130)

Thus, when trustees manage businesses while searching for a buyer, they derive their powers from the *BIA*, which is within federal jurisdiction. However, they are not exempt from the application of all provincial legislation. The *BIA* even makes express provision for the application of compatible provincial legislation relating to property and civil rights. Section 72(1) reaffirms the applicability of laws that are not in conflict with the *BIA*:

> **72.** (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

A trustee who operates a business must satisfy a large number of requirements. For example, he or she may neither fail to collect source deductions from employees' pay nor violate minimum labour standards.

116 As a result, because of the division of legislative powers between the levels of government, trustees are subject to a large number of provincial statutes. Courts that hear disputes relating to the difficulty of applying federal and provincial [page169] statutes concurrently must attempt to reconcile the application of those statutes in a manner consistent with the respective jurisdictions of the two levels of government: *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, [2005] 2 S.C.R. 669, 2005 SCC 56. Where conflict is unavoidable, another doctrine may apply, namely, paramountcy.

4.2 *Paramountcy Doctrine*

117 The paramountcy of federal laws over provincial laws in the event of conflict is a doctrine that was established long ago: W. R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963), 9 McGill L.J. 185. Conflicts that will trigger recourse to this doctrine may occur where it is impossible to apply a federal statute and a provincial statute simultaneously (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191), but may also occur where the application of a provincial statute frustrates the legislative purpose of a federal one: *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, and *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 12.

118 While this principle is easily stated, it is not always easy to apply, as can be seen from the numerous cases on this subject.

4.3 *Specific Context of Bankruptcy*

119 The *BIA* and the *LRA* are not necessarily incompatible. While it is important to acknowledge potential conflicts, it is just as important to ensure that the paramountcy doctrine is not interpreted in a way that makes it impossible to apply provincial provisions in respect of aspects that are compatible with the federal statute. The double aspect doctrine is as important as the doctrine of paramountcy. Courts must ensure that the balance struck by the Constitution is respected and that each level of government can exercise its jurisdiction fully when this can be done without impeding action by the other level.

[page170]

120 In several important judgments on the subject of bankruptcy, this Court has considered the relationship between bankruptcy legislation and various aspects of provincial property law: *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Deloitte Haskins and Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Federal Business Development Bank v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 1061; *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, and *D.I.M.S. Construction inc. (Trustee of) v. Quebec (Attorney General)*, [2005] 2 S.C.R. 564, 2005 SCC 52.

121 In *Husky Oil*, Gonthier J., writing for the majority, summarized the principles that can serve as a basis for a "consistent and general philosophy as to the purposes of the federal system of bankruptcy and its relation to provincial property arrangements" (para. 31). He not only noted that provinces may not *directly* affect priorities under the *Bankruptcy Act*, but also stated propositions that permit the paramountcy doctrine to be applied where provincial legislation *indirectly* conflicts with the *BIA* (paras. 32 (quoting A. J. Roman and M. J. Sweatman, "The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. Bar Rev.* 77, at pp. 78-79) and 39):

> (1) provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the Bankruptcy Act;
> (2) while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred section 136(1) of the Bankruptcy Act determines the status and priority of the claims specifically dealt with in that section;
> (3) if the provinces could create their own priorities or affect priorities under the Bankruptcy Act this would invite a different scheme of distribution on bankruptcy from province to province, an unacceptable situation; ...

[page171]

> (4) the definition of terms such as "secured creditor", if defined under the

> Bankruptcy Act, must be interpreted in bankruptcy cases as defined by the federal Parliament, not the provincial legislatures. Provinces cannot affect how such terms are defined for purposes of the Bankruptcy Act[;]
>
> ...
>
> (5) in determining the relationship between provincial legislation and the *Bankruptcy Act*, the form of the provincial interest created must not be allowed to triumph over its substance. The provinces are not entitled to do indirectly what they are prohibited from doing directly;
>
> (6) there need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy and to conflict with the order of priorities of the *Bankruptcy Act* in order to render the provincial law inapplicable. It is sufficient that the *effect* of provincial legislation is to do so. [Emphasis in original.]

122 Although the propositions enunciated in *Husky Oil* relate more specifically to conflicts between provincial statutes and the scheme of distribution established in the *BIA*, they have a scope that extends beyond that specific context, and they demonstrate how the paramountcy doctrine applies in the context of bankruptcy.

123 In principle, a trustee should not be bound by obligations that interfere with the resolution of the bankruptcy. However, all the conflicts to which I have alluded will not occur every time the OLRB makes a successor employer declaration. On the one hand, it may be that in the particular circumstances of a case, the trustee's conduct is inconsistent with the role entrusted to him or her by the *BIA*; on the other hand, the OLRB may make a partial declaration if the union does not require the transfer of all the former employer's obligations. The case at bar is a good example of the latter situation. The union argues that it is not seeking a declaration of liability for debts owed before the appointment of the receiver. While this clarification is helpful, it does not avert every potential conflict.

[page172]

124 The Superior Court plays a decisive role in identifying potential conflicts and must not authorize proceedings that could give rise to a conflict. A judge who denies leave to bring proceedings does not declare the provincial provision to be of no force or effect; he or she merely avoids the conflict by relying on the paramountcy doctrine in a preventive manner, hence the importance of the screening mechanism of s. 215 *BIA*.

5. Section 215 *BIA*

5.1 *Purpose of Section 215 BIA*

125 As I mentioned earlier, Parliament's intent to give trustees flexibility in administering bankruptcies is evident in the immunities provided for in the *BIA*. Section 215 plays an important role in protecting trustees, because a superior court must, in applying it, screen proceedings that could be brought against them. It reads as follows:

> **215.** Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made

under, or any action taken pursuant to, this Act.

126 My colleague Abella J. objects to incorporating factors related to the special nature of a declaration that a trustee is an employer into the criteria for applying s. 215 *BIA*. To do so would in her view be to create a special and exceptional test for such a declaration. I myself see it as an incorporation of constitutional principles and an adjustment to new dimensions of the remedies that may be authorized against trustees.

127 Like Feldman and Cronk JJ.A., I am of the opinion that s. 215 acts as a screening mechanism for the purpose of ensuring that provincial and federal statutes do not conflict with each other. The bankruptcy judge acts as a specialized tribunal. Not only is the bankruptcy judge responsible for applying the federal statute, which must take precedence over provincial legislation in the event of [page173] conflict, but he or she is also the first person before whom the issue of the potential conflict is raised and the only one in a position to assess all the interests at stake. It is the bankruptcy judge who must decide all issues relating to the application of the *BIA*.

128 In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14, the Court recognized the central role of the first court or tribunal to which a claimant applies. That case required a decision as to which of two administrative tribunals should decide an issue relating to human rights. In the case at bar, the choice is between the Superior Court and an administrative tribunal, the OLRB, and, what is more, it involves a constitutional question. In light of the Superior Court's expertise in bankruptcy matters and in matters relating to the Constitution, there is all the more reason to choose the Superior Court instead of the administrative tribunal. The bankruptcy court must be permitted to play its central role in full before the tribunal external to the bankruptcy considers the application against the trustee: *Sam Lévy & Associés Inc. v. Azco Mining Inc.*, [2001] 3 S.C.R. 978, 2001 SCC 92. In contrast, the OLRB specializes in labour relations, and its mission is to apply the *LRA* and, more specifically in the case at bar, s. 69(2), the purpose of which is to protect employees. Since the bankruptcy of a business affects the interests of all the creditors, not just of the employees, the bankruptcy judge is in a better position to evaluate the interests at stake and prevent conflicts.

129 I agree with my colleague Abella J. that the trustee is not immunized by the *BIA*. There are two sections that provide for supervision of the trustee's activities: ss. 37 and 215. Section 37 allows any interested person to apply to the bankruptcy court to have it confirm, reverse or modify an act or decision of a trustee that is the subject of a complaint. This remedy is not conditional on first obtaining leave and it sometimes constitutes an alternative remedy to s. 215 *BIA*. What distinguishes s. 37 from s. 215 is that the latter allows proceedings to be brought in a court or tribunal *other* than the [page174] bankruptcy court and that it requires leave. Leave is required here because Parliament intended that the bankruptcy court have control over the proceedings. The other court or tribunal is not one that specializes in bankruptcy matters.

130 The vast majority of the decisions based on s. 215 are from cases involving alleged wrongdoing by a trustee: *Alamo Linen Rentals Ltd. v. Spicer Macgillivry Inc.* (1986), 63 C.B.R. (N.S.) 38 (Ont. Prov. Ct.); *Beatty Limited Partnership (Re)* (1991), 1 O.R. (3d) 636 (Gen. Div.); *Chastan Ventures Ltd., Re* (1993), 23 C.B.R. (3d) 115 (B.C.S.C.); *Willows Golf Corp. (Bankrupt), Re* (1994), 119 Sask. R. 208 (Q.B.); *McKyes, Re*, 1996 CarswellQue 2575 (Sup. Ct.); *Nicholas v. Anderson* (1998), 5 C.B.R. (4th) 256 (Ont. C.A.); *Gallo v. Beber* (1998), 7 C.B.R. (4th) 170 (Ont. C.A.); *Kearney v. Feldman*, [1998] O.J. No. 5109 (QL) (Gen. Div.); *Burton v. Kideckel* (1999), 13 C.B.R. (4th) 9 (Ont. S.C.J.); *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 20 C.B.R. (4th) 160 (Ont. C.A.); *Mann v. KPMG Inc.* (2000), 197 Sask. R. 181, 2000 SKQB 460; *Vanderwoude v. Scott & Pichelli Ltd.* (2001), 25 C.B.R. (4th) 127 (Ont. C.A.); *Caswan Environmental Services Inc., Re* (2001), 24

C.B.R. (4th) 191, 2001 ABQB 240; *K.D.N. Distribution & Warehousing Ltd., Re* (2002), 33 C.B.R. (4th) 77 (Ont. S.C.J.); *Canada 3000 Inc. (Re)*, [2002] O.J. No. 3266 (QL) (S.C.J.); *MacLean v. Morash* (2003), 219 N.S.R. (2d) 83, 2003 NSSC 219; *Down, Re* (2003), 46 C.B.R. (4th) 58, 2003 BCSC 1286; *Jiwani v. Devgan*, [2005] O.J. No. 2868 (QL) (S.C.J.); *105497 Ontario Inc. v. Schwartz Levinsky Feldman Inc.* (2005), 12 C.B.R. (5th) 122 (Ont. S.C.J.); and *477470 Alberta Ltd., Re* (2005), 12 C.B.R. (5th) 125, 2005 ABQB 430.

131 The courts have hesitated to grant leave to bring proceedings against a trustee for the purpose of obtaining a declaration that the trustee is a successor employer. The instant case exemplifies this, but the Court of Appeal is not alone in this respect: *588871 Ontario Ltd., Re* (1995), 33 C.B.R. (3d) 28 (Ont. Ct. (Gen. Div.)).

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132 With the evolution of administrative law and the growing number of specialized tribunals, s. 215 is now used for a much wider variety of purposes than before. I agree with what Feldman J.A. said on this subject:

> In cases to date dealing with leave under s. 215 of the *BIA*, such as *Mancini*, where the issue has been trustee wrongdoing, factors relating to the bankruptcy court's control over the process have not arisen. In such cases, if leave is granted, the trustee will hire a lawyer to defend it in court, and the trustee will proceed to carry out its duties conducting the receivership or bankruptcy. [para. 54]

133 Applications for leave based on grounds other than negligence or refusal by the trustee to discharge his or her duties are thus a fairly recent occurrence. It is quite clear from the few reported cases that bankruptcy judges are desirous of preserving the trustee's flexibility and that they ensure that proceedings brought before the other court or tribunal do not impede action by the trustee. For instance, in *Royal Crest Lifecare Group, Re* (2003), 40 C.B.R. (4th) 146, the Ontario Superior Court dismissed a union's motion for leave to apply to the OLRB on the following basis:

> There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E&Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning *qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities. [para. 29]

On an appeal from that judgment ((2004), 46 C.B.R. (4th) 126, at para. 27), the Ontario Court of Appeal explicitly approved the Superior Court's approach, although it noted the constraints inherent in the bankruptcy context:

> A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose [page176] substantial sums of money. Employees of the bankrupt company instantly lose their jobs.
>
> The bankruptcy judge is thrown into the middle of the disaster. The judge will

> need to make important decisions that will affect the future of the company, creditors and employees. The qualities of a good bankruptcy judge are therefore expertise, sensitivity and speed.
>
> ...
>
> The trustee has many responsibilities -- to the estate it is managing, to creditors and to the court. Where, as here, a trustee in bankruptcy seeks to hire former employees of the bankrupt company, the trustee also has a responsibility to those employees. The trustee's decision to bring a motion on the first day of its trusteeship seeking a declaration that it not be deemed a successor employer "for any purpose whatsoever" was, in the bankruptcy judge's view, premature. Accordingly, he dismissed the motion. The trustee does not appeal this component of his decision.
>
> Equally, the appellants' cross-motion, understandable perhaps because of the trustee's motion, was also, arguably, misconceived. The first day of a bankruptcy is hardly "business as usual" for anyone, including the employees. The relationship between the trustee and the employees of the bankrupt company cannot be resolved instantly. Care, sensitivity, negotiation and at least some time will be necessary before an appropriate relationship can be set in place. The bankruptcy judge regarded the union's cross-motion as premature as well. Accordingly, he dismissed it, but without foreclosing the possibility that such a motion could succeed once the parties, at a minimum, had explored the establishment of an appropriate employment relationship. Again, I see no basis for interfering with the bankruptcy judge's exercise of discretion in this regard. [paras. 21, 22, 31 and 32]

134 Thus, the purpose of ss. 37 and 215 is not to immunize the trustee against legitimate proceedings, but to permit the trustee's administration to be supervised without impeding it. Facilitating a form of supervision by the bankruptcy court supports the trustee's role. The *BIA* establishes a scheme under which the effectiveness of the trustee's administration can be taken into account without shielding [page177] the trustee from the courts' power of supervision. Section 215 does not indicate what criteria must be met. The flexibility afforded by Parliament permits the bankruptcy court to adapt to new realities, including successor employer declarations.

5.2 *Criteria for Granting Leave*

135 *Mancini (Bankrupt) v. Falconi* (1993), 61 O.A.C. 332 (C.A.), is often cited as the source of the analysis that the judge must conduct. Although the criteria established in that case are easy to apply to a simple claim against a trustee for breach of his or her duties, they must be tailored to the specific nature of each application for leave.

5.2.1 *Mancini* and the Sufficiency of the Evidence

136 There is a need to demystify the analysis developed in *Mancini*. In that case, the moving parties applied for leave to commence an action by way of counterclaim for damages against a trustee. They alleged that the trustee's proceeding constituted an abuse of process and that the trustee had organized a criminal prosecution. The moving parties thus accused the trustee of wrongdoing and asked for an award of damages against the trustee personally. This was not a proceeding likely to impair the application of the *BIA*. The judge did not need to consider the effect the proceeding might have in this regard. However, the Court of Appeal clearly differentiated between two matters a judge must consider on an application for leave under s. 215: the seriousness of the cause of action and the sufficiency of the evidence. On the seriousness of the cause of action, the Court of Appeal in *Mancini* did not set out the

applicable analysis, but simply summarized the case law.

137 In my view, the most interesting aspect of that case was the court's discussion about the standard of proof. Moreover, that was the main issue in the case. The Court of Appeal wrote the following:

[page178]

> In considering whether leave should be granted under s. 186 [now s. 215] of the *Bankruptcy Act* to commence an action against the trustee, the motions court judge was required to consider the evidence, very generally reviewed above, in the context of the counterclaim sought to be made against the trustee. The issue is not whether the evidence on the s. 186 motion discloses the existence of a cause of action against the trustee, but rather whether the evidence provides the required support for the cause of action sought to be asserted by way of the appellants' counterclaim. Thus, it is necessary to examine the claims that the appellants sought to make against the trustee.
>
> ...
>
> The appellants submit that the motions court judge erred in holding that the evidence filed in support of their motion under s. 186 of the *Bankruptcy Act* must be sufficient to establish a factual foundation for the claim that the appellants propose to make against the trustee. The appellants submit that the test under s. 186 requires no more than some evidence providing a factual foundation for the claim they seek to assert. In my opinion, the motions court judge was correct in reaching the conclusion he did on this issue. On a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under s. 186 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.
>
> The sufficiency of the evidence must be measured in the context of the purpose of s. 186 which, as stated earlier, is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action. As I have previously noted, the evidence on a motion under s. 186 does not have to be sufficient to enable the motions court judge to make a final assessment of the merits of the claim sought to be made, but it must be sufficient to address the issues that I have identified, having in mind the objectives of s. 186. [Emphasis added; paras. 12, 16 and 17.]

138 In saying this, the Court of Appeal was affirming the decision of the trial judge ((1989), 76 C.B.R. (N.S.) 90), who had adopted a clear formulation of what evidence would be sufficient for leave to be granted to bring proceedings against a trustee:

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> Because the decision requires an exercise of discretion, the Court must make a more thorough enquiry than when considering whether or not a claim, *as a matter of*

> *law*, discloses a cause of action. In considering whether a claim discloses *a cause of action*, the Court presumes the allegations in the claim to be true to determine whether those allegations can provide the basis for a remedy. On a section 186 application, the Court must consider whether there is *evidence* of a factual basis for the proposed claim. The policy of section 186 is to protect the Trustee from claims which have no basis in fact. Ensuring a proper factual foundation for a proposed claim requires that the alleged facts must be disclosed by sufficient affidavit evidence. Facts are not allegations merely to be accepted at face value. [pp. 93-94]

139 If *Mancini* can be considered to have laid down a threshold or test of some sort, I would say that the test relates to the standard of proof required for the bankruptcy court to grant leave to bring proceedings.

140 With regard to the sufficiency of the evidence, *Mancini* thus makes it clear that the judge to whom an application for leave is made under s. 215 cannot accept vague allegations. The allegations must be supported by the evidence. The judge does not have to be convinced that the action is well founded, since he or she is not the trier of fact. However, the judge must ensure that there is sufficient factual evidence, whether in the form of affidavits or exhibits, to support the allegations. To do this, the judge must review the evidence. In ordinary usage, the standard of proof in civil proceedings is often characterized as requiring either proof on the balance of probabilities or *prima facie* evidence. The threshold under s. 215 is not the trial judge's threshold of proof on the balance of probabilities, but *prima facie* evidence.

141 Unlike in *Mancini*, what is in issue in the case at bar is not the question *of fact* of the sufficiency of the evidence, but the question *of law* that is considered at the stage of the review of the seriousness of the cause of action.

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5.2.2 Seriousness of the Cause of Action

142 The review of the seriousness of the cause of action must be adapted to the nature of the proceedings the applicant intends to bring. If, as in *Mancini* and the majority of the cases submitted to the courts until quite recently, a monetary award is all that is sought, the proceedings do not prevent the trustee from carrying out his or her duties or impose a burden on the trustee that is incompatible with the *BIA*.

143 However, bankruptcy judges clearly cannot grant leave to bring proceedings that are incompatible with the *BIA*. Thus, a bankruptcy judge could not authorize proceedings aimed at holding a trustee liable where the *BIA* immunizes trustees against the liability in question, as in the case of environmental damage. Since a full defence is available to the trustee pursuant to s. 14.06(2) and (4), such proceedings could not be characterized as serious or, in the words used in *Mancini*, "not frivolous". When a proceeding is not a simple action in damages based on wrongdoing by the trustee, the judge must therefore assess the nature and scope of the proceeding in light of the evidence.

144 Thus, in proceedings in which the OLRB is asked to declare that a trustee has succeeded to the bankrupt as employer, the review by the bankruptcy judge enables the judge to identify the union's actual objective in making this request. This makes it possible for the bankruptcy judge to reconcile the

employees' interests with those of anyone else who has interests in the bankruptcy.

145 The judge's review does not have the effect of giving special or different treatment to successor employer declarations. Regardless of the reason the judge gives for granting leave to bring proceedings, the general context of the bankruptcy remains relevant. The judge must play an active role, anticipate the consequences of the proceedings, and limit their scope if need be. Screening the proceedings in this way is in fact what the trial judge did when he amended the order appointing [page181] the receiver so as to limit the protection of the receiver to acts it carried out in the context of the liquidation of the property. This limitation should be qualified if, for example, the issue concerns the rate of wages paid by the trustee. The process engaged in by the trial judge is nevertheless an example of what bankruptcy judges can be required to do on a regular basis in the course of their interactions with the parties. They can tailor the leave they grant to the specific needs of each case. When reviewing the seriousness of the cause of action, the bankruptcy judge must be vigilant and must deal with conflicts that could impair the application of the *BIA*.

146 In the case at bar, Feldman J.A. concluded that an operational conflict results each time a bankruptcy judge denies leave to bring proceedings under s. 69(2) *LRA*:

> Because the denial of leave under s. 215 of the *BIA* can be used by the bankruptcy court in appropriate circumstances to preclude the OLRB from exercising its exclusive jurisdiction to declare a person a successor employer, it is in operational conflict with s. 69 of *LRA* when such leave is denied. When that occurs, s. 72(1) of the *BIA* is engaged, with the result that s. 69(12) of the *LRA* is superceded by s. 215 of the *BIA*. [para. 69]

147 I myself would present this idea from a positive perspective. Judges who exercise their jurisdiction under s. 215 are in a position to avoid operational conflicts. By ensuring that the conclusions being sought do not impair the application of the *BIA* and, if need be, limiting the scope of proceedings based on a provincial statute, the bankruptcy judge permits the federal statute and provincial legislation to be applied simultaneously.

148 If the union seeks only to maintain wage rates, the proceedings can be limited to that purpose. Similarly, the problem of the period during which the declaration will be effective can be resolved by specifying that the trustee's liability will terminate when the business is transferred to the purchaser.

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149 Some cases, such as those involving seniority, may be difficult to evaluate. The issues in such cases will turn on the specific facts of each bankruptcy situation and will sometimes require an assessment of the overall impact of the proceedings.

150 Feldman J.A. mentioned the following factors:

> The factors that the bankruptcy court applies on a s. 215 application will relate to both procedural and substantive aspects of the process. Some important factors will include: the timing of the application, the complexity of the receivership and the demands on the receiver as it carries out its obligations, the potential duration of the period that the receiver intends to operate the business before it can be sold (normally as brief as possible), the availability of potential purchasers and their financial strength, and the likelihood that a purchaser will be declared a successor employer

> and assume all of the obligations under the collective agreement. This latter factor may be particularly important because it will give practical assurance to the union that all of the terms of the collective agreement will be honoured and the employees protected. Another key factor is the practicality of proceeding before the OLRB and the timeliness of a hearing before that tribunal in the context of the proposed temporary operation of the business and its sale. [para. 58]

These factors could be applied incorrectly. They inevitably overlap with those that will determine the decision on the merits. The bankruptcy judge must take care not to supplant the court or tribunal that will rule on the merits.

151 Using the factors proposed by Feldman J.A. entails a second risk. These factors do not expressly mention the employees' rights. The trustee represents the interests of all the creditors, including the employees. The proposed factors must therefore be resituated in the context of the exercise of a remedy that necessarily implies constraints relating to the rights of all the creditors. They cannot serve to allow the trustee to evade the application of a statute that, although it may create a constraint, does not hinder the trustee's [page183] work. Judges must therefore bear in mind that they will be justified in limiting the scope of proceedings or denying leave to bring them only if the proceedings would genuinely hinder the trustee's work. The judge's first task is therefore to enquire into the actual effect of the application, not a vaguely defined effect on the administration of the bankruptcy.

152 Employees' wage rates are one example of a constraint related to the application of the collective agreement that does not ordinarily hinder the trustee's work. Trustees who retain employees' services do not necessarily have the right to reduce their wages. Consequently, if a union seeks a declaration that a trustee is the bankrupt's successor for the sole purpose of maintaining wage rates, and if the interests of the parties cannot be reconciled at the hearing before the bankruptcy court, then leave should normally be granted. An order that a monitor pay recalled employees in accordance with the terms of the collective agreement has been made in the context of the *Companies' Creditors Arrangement Act*. Such an order does not generally lead to conflict with the duties of a liquidator or a trustee: *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*, [2003] Q.J. No. 264 (QL) (C.A.).

153 Moreover, the review before the bankruptcy judge of the consequences of a declaration is likely to make the parties aware of their respective interests and create an atmosphere conducive to the respect of everyone's rights. When considering the application, the judge must therefore bear in mind all the interests at stake and accept that every constraint does not necessarily hinder the trustee's work. An approach that focussed too much on the management flexibility required by the trustee could all too easily lead the judge to find that a conflict exists and would hardly be in keeping with s. 72 *BIA*.

154 To sum up, a judge who must decide whether to grant leave to bring proceedings against a trustee must determine the actual scope of the remedy being sought, identify potential conflicts and tailor [page184] the leave so as to avoid a situation in which proceedings based on provincial law have the effect of hindering the discharge of the trustee's duties and responsibilities under the *BIA*. Determining the scope of the remedy is part of the review of the cause of action. Since conflicts of jurisdiction are not tolerated in constitutional law, proceedings that lead to a constitutional conflict have no basis in law. The judge must tailor the leave. If the conflict cannot be avoided in this way, then leave to bring the proceedings must be denied.

6. Application to the Case at Bar

155 My colleague Abella J. concludes that leave to bring proceedings should be granted. I myself believe that the case should be reconsidered by the Superior Court. The union has not stated its objective other than to say that the proceedings do not concern debts incurred prior to the trustee's appointment,

but this is insufficient to eliminate every potential conflict of jurisdiction, and it is also insufficient for us to substitute our assessment for that of the trial judge.

156 To appreciate the nature of the analysis the bankruptcy judge must carry out, it will be helpful to set out the facts of the case.

157 On January 18, 2002, the respondent GMAC Commercial Credit Corporation -- Canada ("GMAC"), the principal creditor of the respondents T.C.T. Logistics Inc. and T.C.T. Warehousing Logistics Inc. ("T.C.T."), was informed that T.C.T. had artificially inflated its accounts receivable and had obtained advances from GMAC that exceeded the value of its security by $21 million. On January 24, 2002, at GMAC's request, the Ontario Superior Court appointed KPMG Inc. as interim receiver of T.C.T.'s property. The appointment order provided that no proceedings could be commenced against KPMG without leave of the Superior Court. The order also stated that KPMG would not be considered to have succeeded to T.C.T. as employer. On February 25, 2002, T.C.T. made an assignment in bankruptcy. KPMG was appointed trustee in bankruptcy. As of the date of the bankruptcy, T.C.T. was [page185] operating a brokerage, logistics, trucking and warehousing business in Canada and the United States. The sale of the business was considered urgent (refusal by GMAC to advance additional funds, trucks located across Canada and the U.S., perishable goods still in transit or in warehouses, storage of property at risk, etc.).

158 T.C.T. had 1,357 employees across Canada, including unionized employees represented by 13 different unions. There were 225 employees in the warehousing division, which included warehouses located in Edmonton, Calgary and Toronto. The operation of these warehouses was subject to collective agreements covering 78 employees, including the 42 employees in the Toronto warehouse, who were represented by the appellant, Industrial Wood & Allied Workers of Canada, Local 700 (the "union"). On April 12, 2002, KPMG reached an agreement with Spectrum Supply Chain Solutions Inc. ("Spectrum") under which Spectrum would buy certain specified assets of T.C.T.'s warehouses. The letter of intent initially signed by Spectrum and KPMG provided that Spectrum would operate the warehouses and continue to employ most of the employees. After evaluating the assets, however, Spectrum decided that two of the warehouses were of no interest to it, including the one in Toronto, which was considered to be in disrepair. The final agreement provided that the employees would be terminated and that the lease of the Toronto warehouse would not be assigned to Spectrum. On April 16, 2002, the Toronto employees were informed of the agreement with Spectrum and were also informed that KPMG would be applying to the Superior Court for approval of the agreement on April 18, 2002. The Toronto warehouse was closed on May 23, 2002.

159 On May 13, 2002, the union filed two applications with the OLRB in which KPMG was named as a responding party. The purpose of the first was to have Spectrum declared to be the successor employer to T.C.T. and KPMG under s. 69(2) *LRA*. The second was a complaint of unfair labour practices. KPMG contested the applications, submitting that all proceedings were stayed pursuant to the appointment order and the *BIA* and that the [page186] union had not applied to the Superior Court for leave, as required by the appointment order and by s. 215 *BIA*. On August 27, 2002, the OLRB ruled in the trustee's favour and stayed the hearing of the applications.

160 The proceedings in the Superior Court concerned only KPMG. The union's application to have Spectrum recognized as the successor to T.C.T. with respect to its obligations as an employer was not in issue.

161 The reasons given by Ground J. of the Superior Court on the merits of the remedy the union sought to exercise were clear ((2003), 42 C.B.R. (4th) 221). Ground J. concluded that the trustee had merely acted as a liquidator and should not, as such, be declared the bankrupt's successor. He did not consider the actual objective being pursued by the union or the possibility of limiting the scope of the

proceedings that could be brought before the OLRB. Moreover, it is impossible to determine whether he considered these proceedings to be frivolous or to have no chance of succeeding or whether he felt that the evidence did not *prima facie* support the union's cause of action. In any event, the judge analysed the merits of the case as if he himself was the trier of fact.

162 One observation is necessary here. The unqualified conclusions sought by the union are likely to result in direct conflicts with the application of the *BIA*. Neither the facts in the record nor the positions advanced by the parties are sufficient for this Court to engage in the review that is the Superior Court's responsibility. The union and GMAC do not agree on the scope of the successor employer declaration sought by the union in the instant case. The union does not seek to place a time limit on the declaration that the receiver and trustee is a successor employer. Nor has it stated if it is seeking a monetary award or the reinstatement of all unionized employees in the context of the unfair labour practices complaint. Does the dispute concern only wages or does it also relate to transfers and terminations of staff? Other issues could be raised by the parties, who are familiar with all aspects of the case. Not only is it necessary to assess the [page187] sufficiency of the evidence, but the uncertainty surrounding the scope of the proceedings and the union's actual objective prevents the Court, incontrovertibly in my view, from granting the union the leave it seeks and that was denied by the judge of the Superior Court.

7. Conclusion

163 The analytical approaches of the Court of Appeal and the Superior Court had the effect of avoiding a constitutional conflict, but they could block legitimate actions. Even in their role as liquidators, trustees are often required to conform to obligations imposed on them by provincial legislation. Not every constraint inherent in a proceeding for a successor employer declaration is liable to hinder the administration of the bankruptcy. The criteria proposed by the Superior Court and the Court of Appeal are therefore too demanding.

164 I propose instead to incorporate into s. 215 a review designed to prevent constitutional conflicts. Under this approach, the paramountcy doctrine would apply only where the third party's proposed action would hinder the application of the *BIA*.

165 Furthermore, I believe that this Court should not supplant the Superior Court to assess the cause of action and the sufficiency of the evidence. In the review required by s. 215, the trier of fact has an active role to play. It is the trier of fact who must conduct the review.

166 The Court of Appeal ordered that the case be remitted to the Superior Court. That was a sound decision. The matter must therefore be remitted not only for a review from the constitutional standpoint, but also for a review of the seriousness of the cause of action and the sufficiency of the evidence. The Superior Court did not conduct this more complete review. The Court of Appeal's disposition should accordingly be confirmed.

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167 For these reasons, I would dismiss the appeal and the cross-appeal.

Solicitors:

Appeal allowed with costs, Deschamps J. dissenting. Cross-appeal dismissed with costs.

Solicitors for the appellant/respondent on cross-appeal: Koskie Minsky, Toronto.

Solicitors for the respondent/appellant on cross-appeal: Ogilvy Renault, Toronto.

Solicitors for the respondent KPMG Inc.: Goodmans, Toronto.

cp/e/qlplh