

SEPTEMBER 14, 2017

Liquidating CCAAs and Pension Deemed Trust Priorities

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The very clearly written decision of Québec Superior Court Justice Stephen Hamilton in the Bloom Lake and Wabush Mines *Companies' Creditors Arrangement Act* (CCAA) proceedings is certain to be the topic of current discussion in the Canadian insolvency and secured lending communities. See the September 11, 2017 [decision](#).

Most important, this appears to be the first unequivocal statement by a CCAA court that distribution priorities in a "liquidating CCAA"¹ should be the same as under the *Bankruptcy and Insolvency Act* (BIA), given the Supreme Court of Canada's decision in *Century Services*.² Although this was the natural evolution of the case law's destination, it is the first starkly clear statement that it has arrived.³

A fundamental consequence of this holding is that pension priorities in a liquidating CCAA should be determined in the same manner as under the BIA – meaning that the only priority for pension amounts in a liquidating CCAA is for missed normal cost contributions as spelled out in sections 6(6) and 36(7) of the CCAA (essentially equivalents of sections 81.5 and 81.6 of the BIA).

Accordingly, Justice Hamilton held that even if the provincial pension legislation in question provides for a deemed trust for any wind-up deficiency (in addition to any other amount), such a deemed trust would be inoperable and ineffective in the context of a CCAA proceeding, given the doctrine of federal paramountcy. The same result applies to federally regulated pension plans because the CCAA and BIA specific priorities were enacted after any relevant provisions of such federal pension legislation.

The final key holding was to be clear that a liquidating CCAA is a "liquidation" and that any reference to "liquidation" in a statute (or, presumably, any contract) should not be narrowly construed as applying only to formal liquidations under a corporate statute. Although this seems to be common sense, it will no doubt be helpful to cite a case clearly addressing the point.

Given that this is a trial level decision, it may not be the last word on these topics. However, the case law continues to mount in favour of clearly determining pension priorities as specifically addressed in the BIA and CCAA. And this case clearly states that when there is no plan in the context of a liquidating CCAA, the BIA priority regime should govern.

¹For those that don't do this all the time, a "liquidating CCAA" is a CCAA proceeding that effectively involves the sale of all or substantially all of the debtors' assets to a third party, either as a going concern or otherwise. Think Target Canada.

²2010 SCC 60.

³Bloom Lake decision, paragraph 208.

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