Top Canadian insolvency cases of 2022

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In 2022, the Canadian Association of Insolvency and Restructuring Professionals reported that corporate insolvency filings increased by 26.3% in the first half of the year compared to the same period of 2021. Data provided by the Office of the Superintendent of Bankruptcy similarly illustrates that that corporate insolvency filings as of October 2022 were up 18.8% when compared to October 2021. With rising interest rates and energy prices, 2023 is expected to be a challenging year for businesses and, potentially, a busy year for insolvency professionals.

In this insight, our national Insolvency & Restructuring Group summarizes some of the key cases from 2022 and look forward to potential issues for 2023.

Overview

CASE	KEY TAKEAWAY
1057863 BC Ltd. (Re), 2022 BCSC 759.	In a *Companies' Creditors Arrangement Act* ("CCAA") proceeding, the supervising court has the jurisdiction to direct the parties to mediate, if doing so furthers the objectives of the CCAA and that when balancing stakeholder interests, the benefits outweigh the costs.
Aldo Group Inc (Re), 2022 QCCS 2181 (2022 QCCA 938)	There is no single appropriate method for valuing the assets of a company undergoing a restructuring. Determining the appropriate method of valuation is a fact-based exercise dependent upon the circumstances of the case.
Antchipalovskaia v Guestlogix Inc., 2022 ONCA 454	While the releases granted in a CCAA Plan include releases of employee claims against the company, the benefit an experienced employee can give

	cannot be erased when determining common law reasonable notice simply because a new, unrelated employer takes over the business.
Blackrock Metals Inc (Re), 2022 QCCS 2828	This decision from the Québec Superior Court is the first reported decision to expressly apply the principles set out in *Harte Gold Corp* (described below) to approve a proposed reverse vesting order ("RVO").
Distinct Infrastructure Group [CV-19-615270-00CL, Endorsement dated July 21, 2022]	Contracting parties should be aware that in circumstances where their agreement may be subject to public disclosure (such as in the context of insolvency proceedings), there is no guarantee that a court will grant a sealing order simply because the parties have contractually agreed to keep the terms confidential. Parties seeking to seal their agreement must be able to demonstrate legitimate concerns about disclosure of the contents that outweigh the public interest in open court proceedings.
Ernst & Young Inc v Aquino, 2022 ONCA 202	In circumstances where a fraud is perpetrated by insiders against the debtor company, the fraudulent intent of insiders may be imputed to the debtor company for the purposes of Section 96 of the BIA. (The Corporate Attribution Doctrine)
Freshlocal Solutions Inc (Re), 2022 BCSC 1616.	In considering whether to approve a stalking horse agreement, the supervising Court will assess whether the benefits of the agreement outweigh the costs, weighing the facts of the particular case, including the status of the sale process as a whole.
Golden Oaks Enterprises Inc v Scott, 2022 ONCA 509	Similar to *Aquino* the corporate attribution doctrine should be applied flexibly in insolvency proceedings, in order to protect creditors and prevent beneficiaries of a fraud from escaping with impunity.

Harte Gold Corp (Re), 2022 ONSC 653	RVOs are not to become the default procedure. Rather, the Court must be satisfied that the contemplated RVO structure is necessary, economically favourable and not prejudicial to any stakeholder when compared to other viable alternatives, and provides adequate consideration to reflect the value of the assets sought to be preserved under the RVO.
Koroluk v KPMG Inc., 2022 SKCA 57	Claims against third parties, such as directors and auditors, cannot be dealt with in a liquidation under business corporations' statutes.
Manitok Energy Inc (Re), 2022 ABCA 117	The Alberta Court of Appeal further clarified the principles in *Redwater*. In particular, abandonment and reclamation obligations ("AROs") will continue to enjoy the *Redwater* super-priority even if regulatory orders are issued after sale transactions.
Mundo Media (Re), 2022 ONCA 607	In keeping with the objectives of the single proceeding model to promote efficiency and maximize returns for creditors, the Court found that the single proceeding model may apply not only to claims by third parties against the debtor, but also claims brought against third parties on behalf of the debtor. The determinative question was the degree of connection of the claim to the insolvency proceeding. See also *Petrowest* decision.
Peace River Hydro Partners v Petrowest Corp, 2022 SCC 41	The Supreme Court of Canada provided much needed clarity on the compatibility of arbitration clauses and receivership procedures, and when the doctrine of separability applies in bankruptcy proceedings. Ultimately, the application of the narrow statutory exceptions to an otherwise valid arbitration agreement is a question for the courts, and a receiver should seek guidance and direction from

	the appointing court on this point.
PricewaterhouseCoopers Inc. v Perpetual Energy Inc, 2022 ABCA 111	In light of *Redwater*, AROs should be accounted for when undertaking a balance sheet insolvency test. Specifically, AROs are inherent to, and operate to depress, the value of a debtor's assets.
Sirius Concrete Inc (Re), 2022 ONCA 524	In the appropriate circumstances, equity may intervene if failing to do so would permit the bankrupt's creditors to be unjustly enriched by the bankrupt's misconduct.
Ward Western Holdings Corp. v Brosseuk, 2022 BCCA 32	The Court can appoint a receiver even when the underlying debt is in dispute in the appropriate circumstances. These circumstances include where a creditor's rights to recover its claim and security are in jeopardy and the appointment of a receiver would advance the interests of justice and convenience.

On the horizon

In light of these decisions, the insolvency law trends we will continue to watch in 2023 include:

- The continuing evolution of reverse vesting orders and judicial treatment of novel transactions requiring reverse vesting orders.
- Growing emphasis on ESG considerations, including in the context of plan or transaction approvals.
- Increasing endorsement of alternative dispute resolution and its intersection with insolvency proceedings.
- Enhanced scrutiny of sealing orders in insolvency proceedings.
- Any possible restatement of the Corporate Attribution Doctrine by the Supreme Court of Canada.

Going forward, we are also watching proposed legislative changes, specifically:

- **Potential changes to the criminal rate of interest** . In March 2022, Bill S-239, *An Act to Amend the Criminal Code* went to second reading in the Senate. The bill proposes to amend the criminal rate of interest under the *Criminal Code* 347 from 60% per annum to the Bank of Canada overnight rate plus 20%, on the date the agreement is entered into or renewed. Similarly, in August 2022, the

Government of Canada launched a consultation paper seeking feedback from stakeholders and members of the public on the criminal rate of interest. Changes in the criminal rate of interest will impact insolvency stakeholders in a variety of ways, but particularly interim financing, which are loans of shorter duration, with fees and interest rates to reflect the distressed borrower.

- **Potential changes to priority for pensions in insolvencies.** In November 2022, Bill C-228, *An Act to Amend the Bankruptcy and Insolvency Act, the Companies Creditors Arrangement Act and the Pension Benefits Standards Act, 1985* went into third reading in the House of Commons. The bill proposes to increase priority for unfunded liabilities or solvency deficiencies of pension plans and claims related to an employer ending participating in group insurance plans in BIA or CCAA proceedings. The changes will have the largest impact on corporations with defined benefit pension plans, and their lenders may be evaluating the impact of the changes on the risk profile.

Case summaries

1057863 BC Ltd. (Re) , 2022 BCSC 759

Background

In this case, the petitioners (Northern Pulp) were the owners of a Pulp Mill in Nova Scotia. A necessary part of their operations included leasing and operating an effluent treatment facility (EFT) that was owned by the Province of Nova Scotia. In 2015, Nova Scotia passed legislation which, among other things, prohibited Northern Pulp from using the EFT after Jan. 31, 2022. Northern Pulp claimed that this deadline was contrary to the terms of the lease between Nova Scotia and the owners of the pulp mill, which contemplated the use of the ETF until December 2030. Northern Pulp was unable to find a replacement EFT and ceased operations in January 2020 and, in June 2020, commenced CCAA proceedings in British Columbia.

Throughout the CCAA proceedings, Northern Pulp sought to engage Nova Scotia in discussions to address the claims against the Province arising from the legislation. Northern Pulp eventually sought a Mediation Order which would (i) approve a mandatory mediation process; (ii) appoint a neutral third party mediator, and (iii) toll and suspend filing deadlines or action requirements with respect to the certain claims.

The decision

In its decision granting the Mediation Order, the BC Court confirmed its jurisdiction to grant such an order when appropriate, pursuant to CCAA section 11. The Court determined that Northern Pulp was acting in good faith and with due diligence in their attempts to address the claims with Nova Scotia. The Mediation Order had support from notable stakeholders including its major secured creditor and interim financier. Although Nova Scotia opposed the Order, arguing that it was unfair to be forced to mediate and that the mediation would not be useful or productive, the Court noted there were precedents to support forced mediation regimes in Canada and that in weighing the potential benefits against the likely cost, the Order should be granted. The Court also confirmed that, although attendance was mandatory, no agreement was to be dictated by the Court or the mediator. Therefore, Nova Scotia would not be prejudiced by its participation in the mediation and no harm would be caused if no settlement was achieved. However, if a settlement was achieved, it would enable Northern Pulp to monetize a key material asset, which was an important component in its restructuring plan. As a result, the Court concluded that the Order would further the statutory and remedial objectives of the CCAA and granted the order.

Aldo Group Inc. (Re), 2022 QCCS 2181 (leave to appeal denied, 2022 QCCA 938)

Background

Investissement Québec (IQ) was a creditor of the Aldo Group and filed a proof of claim for $42.2 million, claiming that the majority ($40 million) was secured by a movable hypothec without delivery on specific assets (the IQ Collateral), namely software and computer equipment.

The Aldo Group filed a Plan of Arrangement that included payments to secured creditors based on the value of the Aldo Group's assets charged under their security, with unsecured claims for the difference between their claim amount and the value of their collateral. IQ and the Aldo Group disagreed on the value of the IQ Collateral. IQ argued it should be valued based on going-concern value since, as of the valuation date (the date of the Initial Order), the Aldo Group were operating and intended to continue to do so. The Aldo Group argued the charged assets had not been properly identified or, in the alternative, should be valued based on orderly liquidation value due to their insolvency on the valuation date.

IQ and the Aldo Group filed competing expert reports in support of their positions.

The decision

The Québec Superior Court considered the competing expert reports and found that the IQ Collateral was properly identified, but ought to be valued on a liquidation basis ($3.3 million). IQ had an unaffected claim under the Plan for that amount, and an unsecured claim for the balance.

The Court determined that IQ's proposed valuation was based on a theoretical accounting approach and did not represent the actual price that could be obtained for the IQ Collateral at the relevant time. In particular, at the time of the Initial Order, the Debtors were insolvent and dependent on interim financing to operate. The Court also noted that if the IQ Collateral were valued as IQ proposed, the Aldo Group may be unable to implement the Plan, which would have resulted in a liquidation. Accordingly, the Court accepted the valuation analysis provided in the Debtor's expert report.

The Court of Appeal denied leave to appeal.

Antchipalovskaia v Guestlogix Inc., 2022 ONCA 454

Background

In this case, the Ontario Court of Appeal dealt with the notice requirement obligations of a succeeding employer following CCAA proceedings when terminating employees of the preceding employer. The employee began her employment with the business in 2011. Following the employer's CCAA proceedings in September 2016, the employee continued her employment with the successor employer, and continued to have the same responsibilities she had before the CCAA proceedings. Her employment was ultimately terminated by the successor employer in June 2019.

The successor took two steps to expressly make clear that it was not recognizing past service. First, on September 13, 2016, the successor employer sent the employee an offer of employment with a letter stating that the employee's start date would be "the first day following the implementation of the CCAA plan of arrangement and compromise." Second, the successor employer sent a further letter stating that the new start date would be used for all employment related matters. Furthermore, as part of the CCAA proceedings, the Superior Court had made an order including a declaration that released claims by former employees that arose on or prior to the applicable Plan Implementation Date.

The decision

The Court of Appeal acknowledged the effect of the court-ordered release and did not take into account the length of service from the period prior to the CCAA proceedings. However, the Court ultimately followed the approach set out in *Addison v M. Loeb Ltd.*, and gave credit to the employee based on the factor that the successor employer benefitted from the employee's five years of prior experience performing exactly the same work without the need for any additional training.

For further discussion of this case, please see our full article.

Blackrock Metals Inc. (Re) , 2022 QCCS 2828

Background

The debtor companies (BlackRock) were involved in the metals and materials manufacturing business. BlackRock filed for protection under the CCAA and then conducted a court-approved sale and investment solicitation process (SISP), which included a stalking horse bid from one of its secured creditors and a two-phase bid process. By the phase 1 bid deadline, Blackrock received a bid from a special-purpose vehicle (the SPV) backed by individuals that owned approximately 50% of Blackrock's outstanding shares. The SPV requested an extension of the phase 2 bid deadline, which was denied. The SPV opposed approval of the stalking horse bid and an extension of the bid deadline so that the SPV could secure financing for its bid.

The decision

The Superior Court dismissed the SPV's application, noting that it had been unable to secure financing for its bid during an extended 60-day phase 1 bid deadline, and was also unwilling to fund the requested extension of the phase 2 bid deadline. Accordingly, the objects and purposes of the CCAA were better served by allowing the SISP to proceed without disruption.

In the decision, Québec Court accepted the analysis in *Harte Gold* regarding approval of a RVO structure, confirming that the CCAA section 11 provided it with necessary jurisdiction to grant an RVO. The Court did not consider whether it would also need to derive jurisdiction from the CCAA section 36 because of the clear authority granted to the court under the section 11. The Court also confirmed that RVO structures should remain exception and should only be approved in limited circumstances since RVOs do not require a vote by the creditors.

The Court concluded that the requested RVO was appropriate in the circumstances. BlackRock operated in the highly regulated mining industry, and its business operations necessitated - and in fact almost entirely constituted - numerous permits, licenses and authorizations. The RVO structure minimized the risks, costs and delays that may be occasioned by having these assets transferred to a third party. The transaction also contemplated the assumption of certain contracts and preserved the associated pre-filing claims. The transaction did not leave any stakeholder worse off than they would have been under any other viable alternative, particularly since there was no viable transaction that would generate value for unsecured creditors.

Distinct Infrastructure Group Inc., CV-19-615270-00CL, Endorsement dated July 21, 2022

Background

Following the commencement of receivership proceedings in March 2019, multiple proceedings were brought on behalf of Distinct Infrastructure Group (DIG) and by other claimants against former directors and officers of DIG. After a lengthy and complex mediation process, the parties entered into settlement agreements (the Settlement Agreements) to formalize the settlement of seven out of nine proceedings. Two proceedings against other defendants (the Non-Settling Defendants) remain ongoing.

In its motion for the Ontario Superior Court of Justice's approval of the Settlement Agreements, the Receiver requested that the Settlement Agreements be sealed since they contained financial settlement terms and commercially sensitive information. The Settlement Agreements also contained provisions requiring the parties to keep the terms confidential.

The decision

In its decision to grant the sealing order, the Court found that all three prerequisites set out in *Sherman Estate v. Donovan*, 2021 SCC 25 were satisfied. It stated that there was a "clear and unassailable" public interest in promoting the settlement of disputes and the avoidance of litigation. There was also a public interest in preserving commercially sensitive information, particularly in light of the ongoing claims against the Non-Settling Defendants who were not entitled to the financial terms of the settlements.

The Court further held that the requested sealing order, which would seal the entirety of the Settlement Agreements, was proportionate given the complexity of the proceedings, the multitude of parties and the presence of commercially sensitive information throughout the agreements that made it impractical to redact only certain provisions. The Court acknowledged that the Settlement Agreements were the product of hard fought negotiations between multiple claimants defending different business interests and competing for settlement proceeds. The Court further noted that the sealing order was not absolute and could be modified or lifted by the Court in the future.

Finally, the Court determined that the public interest of promoting settlements, especially complex multi-party and multi-proceeding settlements involving parties seeking to protect their commercially sensitive and private information through confidentiality clauses, outweighed the negative impact that the sealing order would have on the open court principle in this case.

For further discussion of this case, please see our full article.

Ernst & Young Inc v Aquino , 2022 ONCA 202

Background

This case concerned the insolvency of two related construction companies operating in Ontario. One of the insolvent companies, Bondfield Construction Company, entered restructuring proceedings under the CCAA. The other, Forma-Con Construction, became bankrupt. The directing mind of both companies was John Aquino (Aquino). During the concurrent insolvency proceedings, the monitor and trustee, respectively, discovered that millions of dollars of payments had been made by the companies to related-parties for no value, as part of a false invoicing scheme. The monitor and trustee brought proceedings under Section 96 of the BIA to have the payments voided.

The central issue was whether the debtors had "intended to defraud, defeat or delay a creditor", which is one of the requirements to void a transaction under the BIA section 96 (1)(b)(ii)(B). The respondents argued that, since the fraudulent scheme injured the debtor, there was no intent on the part of the debtor to defraud creditors. Any fraudulent intent was that of the directing mind.

The decision

The Ontario Court of Appeal upheld the decision at first instance and found that (i) payments made under the invoicing scheme were transfers at undervalue, and (ii) the respondents, including Aquino, were jointly and severally liable for the value stripped from the companies.

The Court of Appeal concluded that Aquino's fraudulent intent ought to be attributed to that of the debtor companies for the purpose of the Section 96 analysis. In so doing, the Court reviewed the common law doctrine of corporate attribution and its application in the context of the BIA. The Court held that corporate attribution should be applied in a context specific manner, and the Court should ask "who should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority - the fraudsters or the creditors?" In the result, the Court concluded that Aquino's intent should be imputable to the debtor companies, to ensure the protection of arm's length creditors over insiders perpetrating the fraud.

For further discussion of this case, please see our full article.

In January 2023, the Supreme Court of Canada granted the principal of the debtors leave to appeal to the ONCA decision.

Freshlocal Solutions Inc. (Re), 2022 BCSC 1616

Background

The Freshlocal group of companies (the Freshlocal Group) operate an online grocery business. In May 2022, the Freshlocal Group obtained CCAA protection, including interim financing. In July 2022, the Group applied for approval of a sale process, which included approval of a stalking horse bid from its interim lender. In support of the stalking horse approval, the interim lender argued that, among other things, fees associated with the stalking horse agreement were intended to offset the interest and fees charged under the interim financing facility.

The decision

The BC Court determined that it was not appropriate to approve the stalking horse agreement in the circumstances. The Court noted that the stalking horse agreement was not the result of a competitive process and that it was not transparent how the price was determined. Further, the Court rejected submissions that the pricing under the stalking horse agreement was linked to the previously approved interim financing, noting that this was not disclosed to the Court at the time the interim financing was approved. The Court also noted that the agreement was not supported by the secured creditors who would bear the brunt of the consequences of the agreement (whether those consequences were positive or negative).

For further discussion of this case, please see our full article.

Golden Oaks Enterprises Inc v Scott, 2022 ONCA 509

Background

This case concerned the bankruptcy of Golden Oaks Enterprises Inc. (Golden Oaks), which had operated a Ponzi scheme. The nature of the scheme was such that (i) Golden Oaks represented that it was soliciting loan investments to buy homes for disadvantageous families, and (ii) in actuality, Golden Oaks used investment monies to make high-interest payments to earlier investors. The Ponzi scheme and company collapsed, and the trustee in bankruptcy commenced litigation against, among others, several investors in the Ponzi scheme who had benefitted from the fraud through receiving payments on their “investments”.

At trial, the recipients of the fraudulent payments argued that the trustee’s claims were barred by Ontario’s *Limitations Act, 2002*, on the basis that the knowledge of Golden Oak’s principal ought to be “attributed” to the company, with the result that the trustee’s claims were out of time. The trial judge dismissed the limitations arguments and granted judgment against certain recipients, who then appealed.

The decision

The Ontario Court of Appeal upheld the result at trial. The Court analyzed the application of the corporate attribution doctrine in the context of civil claims advanced in insolvency proceedings. Relying on the Court’s other recent decision in *Aquino*, the

Court held that corporate attribution ought to be applied contextually. Thus, the Court held that if corporate attribution was applied on the facts of this case it "would undermine a fundamental tenet of insolvency law, the policy of ensuring equitable distribution of the assets between creditors". Accordingly, the Court exercised its discretion to refrain from imputing the principal's knowledge of the fraud to Golden Oaks, and thus the trustee's claims were discoverable after it was appointed and claims were made within time.

Harte Gold Corp. (Re) , 2022 ONSC 653

Background

Harte Gold Corp. (Harte Gold) is a gold mining company that operates a gold mine in Ontario. Harte Gold holds several permits and licences which are necessary to its continued operations. As a result of its liquidity crisis, Harte Gold conducted a pre-filing strategic process to obtain new capital through a sale. However, no binding offers resulted.

Harte Gold subsequently entered CCAA proceedings in December 2021, and conducted a short post-filing sale and investment solicitation process with a stalking horse bid. This second process resulted in two competing credit bids from its secured creditors. The winning bid proposed a transaction structured as a RVO.

On this application, the Ontario court considered whether the RVO and proposed transaction ought to be approved.

The decision

The Court confirmed that the CCAA section 11 grants courts broad jurisdiction, including the authority to grant RVOs so long as they are consistent with the objects and purposes of the CCAA. However, the Court cautioned treating RVOs as the new norm, finding that RVOs should not be granted simply because they are more convenient or beneficial to the purchaser. Given the novel nature of RVOs, approval of an RVO transaction must continue to bear close scrutiny. The Monitor and the court must ensure the contemplated restructuring is fair and reasonable to all parties, having regard to the objectives and statutory constraints of the CCAA, particularly where there is no opposition to the transaction.

The parties must be able to address the following questions:

1. Why is the RVO necessary in this case?
2. Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
3. Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative?
4. Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

In addition, the Court must also consider the factors set out in section 36(3) of the CCAA, which are largely consistent with the well-known *Soundair* principles.

On the facts, the Court found that the transaction was in the interests of all stakeholders and provided for the timely and efficient resolution to Harte Gold's insolvency, and approved the RVO sought by Harte Gold. Among other things, the Court noted that the RVO transaction was preferable to a traditional transaction that would result in additional costs and delays for transfers of Harte Gold's licenses, permits and registrations. The RVO transaction would also preserve employment for over 250 employees and several third party contractors, and maintain Harte Gold's commitment to the First Nations peoples of the area through the preservation of their Impacts Benefit Agreement. The RVO provided greater benefits for the stakeholders than would a liquidation of the company, as such, was in the interest of the stakeholders.

Koroluk v KPMG Inc. , 2022 SKCA 57

Background

PrimeWest Mortgage Investment Corporation (PrimeWest) was a residential mortgage investor that discovered, after dismissing its CEO, that many of its loans were under-secured and its financial statements contained significant errors that overvalued the business. PrimeWest's shareholders subsequently commenced a class action against PrimeWest's directors and auditors (the Class Action). PrimeWest was not named as a party in the class action, but the directors and auditors had potential claims for contribution and indemnity against it.

After a failed attempt to sell the company's assets, PrimeWest's board of directors approved a plan for the corporation's voluntary liquidation and dissolution. The liquidation plan developed by PrimeWest contemplated that the liquidator would establish a claims process to identify and resolve Claims against PrimeWest, which included the Class Action. The claimant in the Class Action brought an application for a declaration that the Class Action was excluded from the liquidation proceedings.

The decision

In overturning the motions decision, the Saskatchewan Court of Appeal held that a court supervising the voluntary liquidation proceedings of a corporation *cannot* grant relief with respect to claims that are not against the corporation. Given that the Class Action was advanced against PrimeWest's directors and auditors, and not against PrimeWest itself, the claims process set out in the liquidation plan could not address the Class Action.

Manitok Energy Inc. (Re) , 2022 ABCA 117

Background

Manitok Energy Inc. (Manitok) was an oil and gas producer that entered receivership proceedings. Through Manitok's receivership proceeding, certain assets were sold to a third party, pursuant to a court-approved sale transaction. The purchaser also assumed future abandonment and reclamation obligations associated with the assets purchased.

However, other of Manitok's oil and gas assets, in respect of which future abandonment and reclamation costs exceeded asset values, were not sold. The unsold assets were "net negative" in value and unsaleable.

After the sale transaction, the Alberta Energy Regulator (AER) issued abandonment orders regarding Manitok's unsold assets.

The AER further asserted that the costs associated with complying with the orders enjoyed first priority over the proceeds from the transaction, based on the Supreme Court of Canada's 2019 decision in *Redwater* (2019 SCC 5). Certain builders' lien claimants, who otherwise had a first-ranking security interest over the sale proceeds, objected to the AER receiving the proceeds.

The chambers judge ruled in favour of the lien-holders and found that *Redwater* did not apply. In doing so, the court found that since the AER had not issued orders at the time of the transaction, the proceeds were not subject to the AER's claim.

The decision

The Alberta Court of Appeal overturned the chambers decision, holding that abandonment and reclamation obligations are not contingent on enforcement action taken by the AER; rather, the public duty on the Receiver to use proceeds of the transaction to discharge Manitok's residual abandonment and reclamation obligations exists independently of any enforcement action taken by the AER. The Court further held that, even though the purchaser had assumed abandonment obligations relating to the purchased assets, all of Manitok's oil and gas assets had to be treated as a single "package" and thus the AER had first claim to the sale proceeds.

For further discussion of this case, please see our full article.

Re Mundo Media Ltd. , 2022 ONCA 607

Background

Mundo Media Ltd. (Mundo) entered receivership in 2019. The receiver brought a motion for judgment against SPay, Inc. (SPay) for over US $4 million arising from unpaid invoices from pre-receivership contracts. Spay sought to stay the receiver's motion on the basis of arbitration clauses in the contracts, which required disputes to be resolved by arbitration in New York and under New York law.

The motion judge dismissed SPay's motion, finding that the arbitration clauses were inoperative due to the "single proceeding model" of insolvency proceedings. Specifically, the motion judge held that the single proceeding model encompasses not only claims against a debtor, but also claims advanced by the debtor against a third party. The motion judge also found that SPay was not a "stranger" to Mundo's insolvency proceeding as it would seek to set-off amounts owing to Mundo, and was therefore subject to the single proceeding model. SPay sought leave to appeal the motion judge's decision.

The decision

The Ontario Court of Appeal denied SPay leave to appeal referring to *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, specifically on the basis that the single proceeding model promotes efficiency in insolvency proceedings and maximizes recovery for the benefit of all creditors. The single proceeding model applies where a third party is not a stranger to the insolvency proceeding. SPay argued that it was a stranger to Mundo's insolvency proceeding on two bases: first, that SPay had not filed a claim against Mundo; and second, that SPay was seeking to assert set-off only as a defence and not issuing a claim against Mundo.

Although Canadian jurisprudence distinguishes between a set-off defence and a claim, such distinction was not determinative in the bankruptcy process. Rather, as the outcome of SPay's proposed set-off affects the amount of Mundo's receivable and the size of the estate, SPay was not a stranger to the bankruptcy proceeding. In other words, irrespective of whether SPay's position was characterized as a claim or a set-off defence, SPay would step into the shoes of a creditor and should thus be treated in the same manner as other unsecured creditors.

This decision was issued prior to the Supreme Court of Canada's decision in *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 (discussed further below). Following the issuance of *Petrowest*, the operability of an arbitration clause must likely be considered with a greater degree of deference as occurred in *Mundo*.

Peace River Hydro Partners v Petrowest Corp, 2022 SCC 41

Background

Peace River Hydro Partners (Peace River), a construction company in British Columbia, subcontracted work to Petrowest Corporation (Petrowest), a construction company in Alberta. The contracts between Peace River and Petrowest contained arbitration clauses that mandated arbitration in the event of a dispute between the parties (the Arbitration Agreements). Less than two years into the arrangement, Petrowest encountered financial difficulties and was assigned into receivership. The Receiver subsequently brought a claim against Peace River seeking to collect funds allegedly owing to Petrowest for performance of work. Peace River applied under the *Arbitration Act* (BC) for a stay of proceedings on the ground that the Arbitration Agreements governed the method of the dispute.

The British Columbia Superior Court held that the Receiver was bound by the terms of the Arbitration Agreements. However, the Court dismissed the stay by applying its inherent jurisdiction to override the Arbitration Agreements pursuant to the BIA section 183. On appeal, the British Columbia Court of Appeal disagreed with the trial judge's use of inherent jurisdiction, and instead applied the doctrine of separability to permit the Receiver to disclaim the arbitration clauses while preserving the agreements for the purpose of suing for recovery. Since the Receiver was not a party to the Arbitration Agreements, section 15 of the *Arbitration Act* was not applicable and the Receiver was justified to litigate the dispute in court.

The decision

The issue before the Supreme Court of Canada was to determine, in the context of a court-ordered receivership under the BIA, the circumstances in which an otherwise valid arbitration agreement would be rendered unenforceable pursuant to the *Arbitration Act*, section 15(2). To determine when a stay of proceedings in favour of an arbitration is appropriate, the court must review the applicable statutory regimes and arbitration agreements. The Supreme Court formulated a two-part framework to guide the exercise under the *Arbitration Act* section 15 and in arbitration statutes across the country:

First, the applicant must satisfy the technical prerequisites for a mandatory stay of court proceedings, abiding by the four technical requirements as follows:

1. There must be an arbitration agreement.
2. The court proceedings must have been started by a “party” to the arbitration agreement.
3. The court must involve a matter that the parties agreed to resolve via arbitration.
4. The applicant must apply for a stay before taking any step in the court proceedings.

The applicant must make out an “arguable case” that each prerequisite has been met and all four prerequisites must be established to move to the second stage of the analysis.

On the second leg of the framework, the respondent must demonstrate that a statutory exception applies. An exception can be found, for example, the *Arbitration Act* section 15(2) which empowers the court to dismiss a stay application where the arbitration agreement is “void, inoperative or incapable of being performed”. In addition to the limited circumstances under contract law for voiding an arbitration agreement, or other impediments rendering performance impossible, the Supreme Court set out a non-exhaustive list of factors for determining when an arbitration agreement may be inoperative:

1. The effect of arbitration on the integrity of the insolvency proceedings.
2. The relative prejudice to the parties caused by resolving the dispute via arbitration.
3. The urgency of resolving the dispute.
4. The applicability of a stay of proceedings under bankruptcy or insolvency law.
5. Any other factor the court considers material in the circumstances.

Peace River successfully established an arguable case that all the technical prerequisites were met. Importantly, the Court confirmed that the Receiver may become a party to an arbitration agreement by operation of law, and receivership appointment does not automatically preclude arbitration.

Further, the Court held that the Receiver succeeded in proving that the arbitration agreements were inoperative, since arbitration would compromise the orderly and efficient resolution of the insolvency proceedings.

In addition to the framework analysis, the Court emphasized that arbitration and insolvency law are compatible due to common interests in promoting efficiency and expediency, procedural flexibility, and expert decision-making. Consequently, courts should generally hold parties to their agreements to arbitrate even when one of them has become insolvent. Importantly, the Supreme Court rejected the Court of Appeal’s application of the doctrine of separability, finding that the doctrine does not apply without a challenge to the validity of the main contract or of the arbitration agreement.

For further discussion of this case, please see our full article.

PricewaterhouseCoopers Inc v Perpetual Energy Inc , 2022 ABCA 111

Background

This decision arose in the saga of litigation relating to the bankrupt, Sequoia Resources Corp. (Sequoia). Sequoia, previously named Perpetual Energy Operating Corp. (PECO), had carried on business in the exploration and development of oil and gas assets in Alberta. Before its name change, the Perpetual Energy group of companies conducted a series of transactions, resulting in PECO transferring or divesting its valuable assets, and assuming hundreds of millions of dollars of AROs, relating to unproductive oil and gas properties. After the transactions, Sequoia, which now held the unwanted AROs, made an assignment into bankruptcy. The bankruptcy trustee then commenced litigation to have the transactions (or at least parts of thereof) voided as transfer at undervalue under the BIA section 96.

Thereafter, the defendants succeeded in applying to have the trustee's claims summarily dismissed, on the basis that AROs transferred to PECO did not result in PECO becoming insolvent. The Chambers judge found that AROs were not "obligations, due and accruing due" for the purposes of a balance sheet insolvency test under the BIA, agreed with the defendants, and dismissed the Section 96 claims. . The trustee appealed.

The decision

The Alberta Court of Appeal reversed the Chambers decision and concluded that AROs must be incorporated into the Court's balance sheet solvency assessment. Specifically, based on the Supreme Court of Canada's *Redwater* decision, and case-law since then, the Court held that AROs are obligations and "intrinsic" to the licensing of an oil and gas asset and must be accounted for in the balance sheet solvency analysis as part of the debtor's assets. In other words, AROs must be accounted for as having the effect of depressing asset values. Consequently, the Court of Appeal allowed the appeal.

Sirius Concrete Inc. , Re, 2022 ONCA 524

Background

This case concerned the bankruptcy of a subcontractor hired to assist with the construction of an apartment building. During the project, the subcontractor's workmanship had been delayed and deficient. Ultimately, a telephone conversation occurred between representatives of the general contractor and the subcontractor, wherein the subcontractor requested payment of a disputed invoice and represented that such payment would enable the project would get back "on track". Based on this representation, the contractor paid the disputed invoice. However, the very same day the subcontractor completed forms to assign itself into bankruptcy, which it did mere days later.

In the bankruptcy proceedings, the general contractor applied for an order that it was entitled to a constructive trust, based on unjust enrichment, over the funds that were paid to the bankrupt in connection with the disputed invoice. The motions judge dismissed the constructive trust claim.

The decision

A unanimous panel of the Ontario Court of Appeal reversed the motions decision. In so doing, the Court affirmed that in the appropriate circumstances a constructive trust may be imposed over property of a bankrupt, even though doing so creates an effective priority in favour of the creditor. In the result, the Court remitted the matter to the motions judge to adjudicate the constructive trust issue.

Sirius is a helpful reminder that, although perhaps rare, equity may intervene if failing to do so would permit the bankrupt's creditors to be unjustly enriched.

For further discussion of this case, please see our full article.

Ward Western Holdings Corp. v Brosseuk, 2022 BCCA 32

Background

Ward Western Holdings Corp. (Ward) owned a mine in BC and Westrike Resources Ltd. (Westrike and together with Ward, the Debtor) owned the permits and mining claims for the mine. Ward entered into an agreement (the SPA) with Brosseuk and others (collectively, the Vendor) to, among other things, acquire the shares of Westrike. The SPA was, in part, funded by vendor takeback financing. Following the SPA, the parties had various disputes, with each asserting breaches of the SPA. As a result of ongoing disputes, the Debtor and Vendor brought competing applications, including one by the Vendor to appoint a receiver over Westrike. The BCSC appointed a receiver and dismissed the Debtor's application for an injunction. The Debtor appealed.

The decision

The Court of Appeal dismissed the appeal finding that the appointment of a receiver is a discretionary decision entitled to deference and that the Debtor had failed to identify an error in principle in the exercise of discretion, confirming that, even when an underlying debt is in dispute, a receiver may be appointed if there is evidence of serious potential prejudice or jeopardy to a creditor's right to recover under its claim and security interest, and that the appointment is just and convenient in the circumstances.

By

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