News

Super Priority for CCAA Charges Granted Preference Over Pension Deficits

Date: February 8, 2012

On February 2, 2012, in On *Re Timminco,* the Commercial Court granted an order for “super priority” for an Administration Charge ($1,000,000) and Directors’ and Officers’ Charge ($400,000) in preference to other encumbrances, including pension deficits in Timminco’s pension plans (aggregate deficit is in excess of $11,000,000). Justice Morawetz found that federal insolvency legislation, specifically the *Companies’ Creditors Arrangement Act* (“CCAA”), is paramount to the pension legislation that establishes a deemed trust over amounts owing to pension plans. This is the first decision from the Ontario courts to find that the CCAA is paramount to the deemed trusts in pension legislation following the decision of the Ontario Court of Appeal in *Re Indalex* (an appeal from that decision will be heard by the Supreme Court of Canada in June 2012).

The pension plans in this case were registered under the Ontario *Pension Benefits Act* (“PBA”) and the Quebec *Supplemental Pension Plans Act* (“SPPA”). The union representing the members of the pension plans, the Communications, Energy and Paperworkers’ Union of Canada (“CEP”), objected to the charges sought by Timminco and argued that the Court of Appeal’s decision in *Re Indalex* prevented the super priority charge, unless application of the deemed trusts would frustrate the company’s attempts to restructure and avoid bankruptcy (CEP also argued that *Re Indalex* stands for the position that Timminco had a fiduciary duty to act in the best interests of the plan members during the CCAA proceedings, but the focus of Justice Morawetz’ decision was on the paramountcy issue).

Justice Morawetz found that the factual context dictated that the super priority should be ordered. For example, Timminco had evidence that it was having difficulties obtaining and securing debtor-in-possession (“DIP”) financing. Timminco also provided evidence that without the charges it would not be able to retain adequate advisors during the restructuring and its directors and officers would be exposed to potential claims as a result of the restructuring proceedings.

Justice Morawetz fully assessed whether the restructuring process under the CCAA would be frustrated if the charges were not granted super priority over the deemed trusts established by provincial pensions legislation. Given the evidence regarding the difficulties obtaining financing and the restrictions on the ability to retain advisors and provide protection for the directors and officers, Justice Morawetz found that it was necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA could override those of the SPPA and the PBA, ensuring that the purpose and objective of the CCAA was fulfilled (providing a *bona fide* opportunity for restructuring). Justice Morawetz also granted Timminco’s request for an order suspending its requirement to make continuing special payments towards the liquidation of the pension deficits.

Timminco has, in fact, obtained DIP financing. A similar motion was recently argued with respect to the priority applicable to the DIP financing. We will continue to monitor these proceedings and provide future updates.

If you have any questions, please do not hesitate to contact a member of our Pension & Benefits Practice Group.