

## LABOUR &amp; EMPLOYMENT

# No need for bankrupt company to recognize pension plan priority

*Ivaco* limits the effect of the deemed trust provisions under provincial legislation

By Mitch Frazer

In its recent decision in *Ivaco Inc., Re* [2006] O.J. No. 4152, the Ontario Court of Appeal dealt with the challenging interplay between pension law and insolvency law. The decision deals with a restructuring in which one of the dominant issues is the treatment of a debtor's unfunded pension liabilities. *Ivaco* highlights the importance of dealing with pension issues early in the restructuring process.

*Ivaco* Inc. and its related companies became insolvent in 2003 and were granted protection under the federal *Companies' Creditors Arrangement Act* (CCAA). As part of the CCAA proceedings, *Ivaco* was granted a pension stay order, which temporarily relieved the company of the obligation to make past service contributions and special payments to the pension plan. The order was unopposed because it was expected to assist *Ivaco's* restructuring effort.

The superintendent of financial

services later brought a motion to have part of the sale proceeds of *Ivaco's* liquidated assets used to pay unpaid pension obligations. The superintendent argued that the deemed trust provisions in the Ontario *Pension Benefits Act* (PBA) required that the pension obligations be paid in priority to all other creditor claims or at least segregated into a separate account. *Ivaco's* business creditors objected to the motion and attempted to petition *Ivaco* into bankruptcy to use the more favourable distribution provisions in the federal *Bankruptcy and Insolvency Act* (BIA). The motions judge dismissed the superintendent's motion and allowed the creditors' motion, in part, thereby permitting the bankruptcy petition to proceed.

The superintendent appealed to the Court of Appeal arguing that the motions judge erred by (i) failing to order immediate payment of the deemed trust amounts or failing to segregate this amount and (ii) exercising his discretion to lift the stay without protecting the pension beneficiaries.

#### Court of appeal decision

The court of appeal dismissed the Superintendent's submission that the motions judge was required to order that the deemed trust amounts be paid at the end of the CCAA proceedings, but before bankruptcy. The court of appeal held that an order for payment of the outstanding pension contributions rests on the proposition that there is a gap between the CCAA and the BIA in which the provin-

cial deemed trust can be executed. However, the court concluded that there is no gap in the federal insolvency regime, which includes both the CCAA and the BIA, in which a provincial deemed trust alone can operate.

In its analysis, the court of appeal specifically referenced the federal *Wage Earner Protection Program Act* (WEPPA) which was passed by Parliament last year, but which still has not been proclaimed in force. WEPPA would amend the BIA to give special priority to unpaid pension contributions of a bankrupt employer.

The court of appeal also rejected the argument that the deemed trust amounts should be segregated on the basis, in part, that a deemed trust is in a sense a "legal fiction" and that it does not create a true trust by itself. The court of appeal held that if the province wants an employer to segregate unpaid contributions to a pension plan, it should legislate that segregation.

Finally, the court of appeal dismissed the superintendent's argument that the motions judge erred by exercising his discretion to lift



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need not be recognized in insolvency situations. This decision could lead to increased efforts by business creditors of an insolvent company to petition a company into bankruptcy and take advantage of the more favourable priority scheme, with the result that fewer companies would be able to restructure.

This decision is significant for pension plan members because it limits the effect of the deemed

trust provisions under provincial pension legislation when these provisions intersect with federal insolvency legislation. Pension contributions may

not be protected by the PBA's deemed trust provisions while under a CCAA stay order. This lack of protection for pension contributions could lead affected plan members to oppose restructuring proposals that involve a reduction in pension plan contributions. This may, in turn, lead to the collapse of the business for which restructuring is being sought, which would have an even greater impact on the pensions of the plan members in question.

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***Ivaco* "suggests that provincial schemes that give give priority to pension obligations need not be recognized in insolvency situations."**

the stay without protecting the pension beneficiaries. The court of appeal was satisfied that the motions judge had weighed all the competing considerations and exercised his discretion properly.

#### Implications of *Ivaco*

This decision highlights the importance of pension issues in the restructuring process and may have significant implications for all stakeholders involved.

The decision is significant for business creditors because it suggests that provincial schemes that give priority to pension obligations

## *Ivaco* may encourage government to recognize benefits of WEPPA

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The decision is significant for pension regulators who may be required to become more involved in restructuring processes when pension obligations are involved

to prevent plan members from suffering a detrimental outcome. For example, the superintendent may, in the future, object to orders that relieve a company from making past service contributions during a CCAA stay.

The decision is also significant

for the federal government, which may be encouraged to finally proclaim WEPPA and give priority to unpaid pension contributions. This would provide needed clarity in this extremely important area.

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