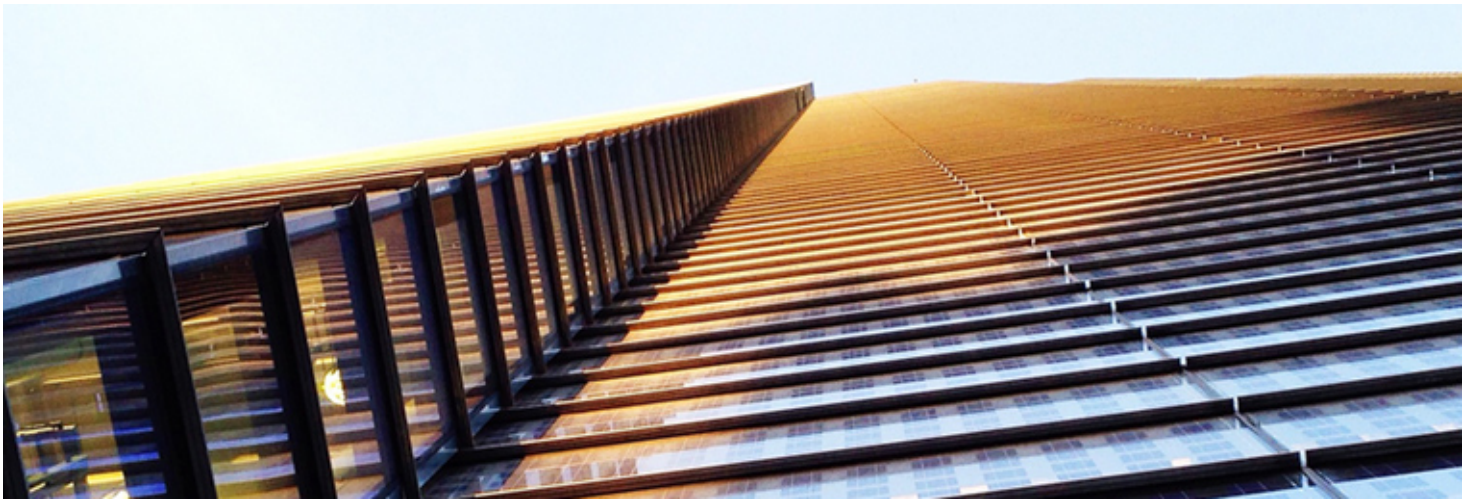

When federal insolvency laws and provincial labour laws collide

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The intersection between insolvency law and labour law has long created a struggle between balancing the rights of employees and maintaining a mechanism for restructuring or liquidating distressed companies. The general principle of paramountcy lies in the background of this balancing act – federal insolvency law will usually prevail where provincial labour law is in conflict with it.

Although a number of insolvency cases have considered labour relations issues (and, similarly, a number of labour cases have involved insolvent employers), *Romspen Investment Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301 appears to be the first instance where an Ontario court was asked to consider whether a union could proceed with a certification application during a receivership proceeding.[1]

Background

On October 19, 2015, the receivership proceedings of several companies, including Courtice Auto Wreckers Limited ("Courtice"), commenced. The receivership order contained the standard provision that no proceeding could be commenced or continued in any court or tribunal against the receiver or the debtors except with the consent of

the receiver or leave of the court.

On December 9, 2015, the International Union of Operating Engineers (the "Union") applied to the Ontario Labour Relations Board ("OLRB") for certification, seeking to represent six employees at one of Courtice's Oshawa locations ("Ontario Disposal"). The Union later filed an unfair labour practices ("ULP") complaint against the receiver after the receiver terminated four of the employees whom the Union sought to represent and hired new employees to perform substantially the same duties.

The OLRB stayed the Union's certification application and ULP complaint based on the stay imposed by the receivership order. The Union sought leave of the court to proceed with its certification application and ULP complaint. The Union's application was dismissed. The Union appealed.

Ontario Court of Appeal sides with Union

In a 2-1 decision, the Ontario Court of Appeal allowed the Union to proceed with its certification application. The Court noted that several of Courtice's other business operations were already unionized, the receiver had been operating Ontario Disposal for over a year "with no definite end in sight" and the receiver had provided no specifics on a planned sale or prospective purchaser for Ontario Disposal. The majority of the Court also made the following observations:

1. It may be true that upon certification certain rights and obligations crystallize, but certification does not have the effect of automatically increasing the rights employees have *as creditors* and, as such, prejudicing other creditors. And, in any event, allowing the Union's certification application to proceed allows for a representation vote only – not necessarily certification.

2. It is speculative to consider the impact of certification on the sales process. There was no concrete evidence that recognition of the proposed bargaining unit would negatively impact a sale. Moreover, the Union, on behalf of its members, has an interest in the business being sold as a going concern and would have an incentive to act in a manner that would promote that outcome.

3. The fact that the Union could pursue its certification application against the purchaser is not persuasive. While flexibility is required to address challenges in insolvency proceedings, the courts should not unduly immunize insolvency proceedings against the legitimate exercise of labour relations rights simply because the assertion of those rights is inconvenient.

4. It is speculative to consider whether the bargaining unit would be meaningful after the completion of any sale. The employees have presently existing rights under the provincial labour laws to organize themselves and seek a collective agent.

5. Maintaining the stay and delaying the representation vote risked undermining the legitimacy of the vote. The scheme of the Ontario *Labour Relations Act* is premised on quick votes, which minimize the possibility of undue influence and maximizes the validity of the vote as a reflection of employee wishes. Delaying the vote prejudices those important objectives.

The majority of the Court also permitted the ULP complaint to proceed, noting that the threshold for granting leave to proceed against a receiver is not high and is designed to protect the receiver against only frivolous or vexatious actions or actions that have no basis in fact. Given the timing of the employees' dismissals, the Court noted that the *prima facie* merit of the ULP complaint was obvious.

Takeaways for court-appointed receivers

Although this case may be confined to its specific facts, it does open the door for unions in other insolvency proceedings to bring certification applications and ULP complaints, thereby further complicating insolvency proceedings.

Accordingly, court appointed receivers will be well served to consider the labour relations impact of their decisions

in advance, to seek advice from counsel before taking any steps as receiver that may adversely impact individuals employed by the insolvent cooperation, and to ensure that sufficient facts are contained in any responding record to demonstrate prejudice of lifting the stay and/or an unfair benefit to be realized by one group of creditors (i.e. employees over others).

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1. This issue was considered in proceedings under the Companies' Creditors Arrangement Act in *Hawkair Aviation Services Ltd.* 2006 BCSC 669.

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