

# focus

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## Insolvency Law

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### THE ONTARIO SUPERIOR COURT HAS FOUND THAT A SUCCESSFUL RESTRUCTURING UNDER THE CCAA WAS GROUND UPON WHICH THE DEBTOR'S BANKRUPTCY COULD BE ANNULLED

In *Greenstone Value Investments Inc. v. Greenstone Resources Ltd.* (2007) CarswellOnt. 1385 (Ont. S.C.), the Court considered an application in the CCAA proceedings of the debtor to approve its Plan of Arrangement, and concurrently considered an application in the debtors' bankruptcy proceedings to annul its bankruptcy.

The debtor had gone bankrupt in the year 2000. The trustee was not able to realize upon any of its assets, due in large part to the fact that the assets were mostly shares in foreign corporations which had no immediate value. The creditors of the debtor were unsecured noteholders who were owed some \$125 million, and other unsecured creditors amounting to \$6.5 million.

A white knight named Trilon Bancorp. Inc. ("Trilon") was interested in a transaction whereby the debtor would be amalgamated with a newly incorporated subsidiary of the bankrupt and the creditors paid in a combination of cash and warrants. CCAA proceedings were commenced and ultimately the Plan of Arrangement was unanimously approved by creditors.

The Court considered whether it could annul the bankruptcy of the debtor, in these circumstances.

First, the Court observed that had the bankrupt successfully completed a proposal under Part III of the BIA, the bankruptcy would have been automatically annulled when the proposal was approved. Here, where there was no BIA proposal, but rather a Plan of Arrangement under the CCAA, the Court adverted to

subsection 181(1) of the BIA which gives the Court discretion to annul a bankruptcy where, in the opinion of the Court, the bankruptcy ought not to have happened.

The Court then considered the case law under subsection 181(1) of the BIA and found that the governing principals were:

- There is no simple or universal principle prescribed, each case is decided on its own facts and imports the exercise of discretion.
- For the Court to annul a bankruptcy it must be satisfied that the Receiving Order ought not to have been made.
- If a Receiving Order is annulled, the bankruptcy is at an end.
- Bankruptcies should be annulled only in very special circumstances.
- The Court must consider not only the rights of the bankrupt but also the rights of the creditors and the public.
- The Court also stated what might be considered a test for this type of application, at paragraph 29:

In my view, in considering whether the bankruptcy "ought not to have been made", the Court should consider, in addition to conditions such as the consent of creditors, the absence of improper conduct by a debtor and overall being in the public interest, what likely would have happened had the opportunity now available been known to the petitioning or applicant creditors at the time the petition or the application against the bankrupt was first made.

In the result, the Court was satisfied that had the Trilon exit strategy (now contained in the CCAA Plan of Arrangement) been available for consideration at the time of the Receiving

Order, a proposal under the BIA or Plan under the CCAA might well have been a viable alternative. In those circumstances, the Court reasoned that the Petition would have been stayed in favour of a proposal or Plan of Arrangement, and so no Receiving Order would have been made.

Therefore, using the wide discretion conferred on the Court under section 181 of the BIA, the Court annulled the bankruptcy, on the ground that the Receiving Order “ought not to have been granted”.

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