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on

Insolvency Law

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FRASER MILNER CASGRAIN LLP

SUPPLIER'S RIGHTS UNDER S. 81.1 OF THE BANKRUPTCY AND INSOLVENCY ACT EXPANDED

Section 81.1 of the *Bankruptcy and Insolvency Act* ("BIA") grants a temporary super priority to suppliers who provided goods to a bankrupt purchaser or where a receiver has been appointed in relation to the purchaser. The section requires the supplier to provide a written demand to the purchaser and allows the supplier to repossess the goods within thirty days of the date of the delivery of goods.

In 1996, in one of the earlier cases which interpreted this section, Farley J. found this section should be narrowly construed because it had the effect of elevating unsecured creditors above other unsecured creditors. It was not until 2005 that this narrow interpretation was expanded when Masuhara J. found that the section was "to be interpreted not narrowly but in such a way as to allow it to operate fairly and practically to protect the interests of a supplier who has delivered with [sic] the 30 day period having regard to the specific circumstances and the goods in question".

The interpretation of this section was recently revisited in *Goldman Sachs Canada Credit Partners Co. v. Pantano Energy Services Inc.* Here, Kent J. of the Alberta Court of Queen's Bench allowed the thirty day time limit to be extended to allow a supplier of equipment access to the super priority under this section.

In November, 2008, Control Technologies Inc. ("Control") supplied oil well equipment to Pantano Energy Services Inc ("Pantano"). A receiver was subsequently appointed over the property of Pantano on December 19, 2008. Control

did not receive notice that the receiver had been appointed until December 31, 2008, and since its offices were closed, it did not have effective notice until January 5, 2009. Control contacted the receiver, who informed the company that the thirty days had passed and Control could no longer send the demand and repossess the supplied goods. Control made a claim on January 15, then subsequently advised the receiver that it would be applying for an extension of the stay of the thirty day period under s. 187(11) of the BIA, which gives the court the authority to extend time periods outlined in the BIA before or after their expiry.

In her reasons, Kent J. reviewed the decisions outlined above, as well as two decisions where the court allowed the time period outlined in s. 81.1 to be extended. In particular, in *Keystone*, a supplier made deliveries to the debtor company on December 1 and 9, 1994. On December 23, a secured creditor attempted to appoint a receiver, however the appointment was not accepted until January 3, 1995 as a result of the holidays. On January 10, 1995, the supplier delivered a demand pursuant to s. 81.1 of the BIA; however, the receiver denied the claim as a result of the expiry of thirty day time period running from the date of delivery. Hall J. found in these circumstances, "Keystone moved with reasonable promptitude to protect its rights" and because the Christmas holidays are a difficult time for businesses to function, he granted an extension to the time period.

Based on these cases, Kent J. finally found the following with respect to section 81.1 of the BIA in paragraphs 10 through 12.

Section 81.1 is unusual in at least two respects. First, it does elevate the rights of an unsecured creditor. Secondly, unlike most legislation, the ability to exercise the right is almost a question of chance. When, in relation to the date of the appointment of a receiver, a creditor like Control delivers the goods may make the ability to repossess meaningless because notice of the appointment may occur after the 30 day period has passed. Here, the last of the goods were delivered on November 26. Effective notice was not received by Control until January 5th.

This section must be interpreted in the context of the whole of the Act. It cannot be said that an extension of time should never be granted. If that was the intent of Parliament, then the legislation would have prohibited the application of s. 187. On the other hand, the Act does establish a regime of priorities. Section 81.1 overrides that scheme for a limited time and for a particular type of creditor. As a result, the application of my discretion must be done prudently and with regard to the specific facts before me.

Here, like in *Keystone*, the Christmas holidays were a material factor affecting Control's ability to act quickly. It did act expeditiously once it had the facts. And, like in *Rizzo*, the issue of Control's elevated status is not relevant because the secured creditor is the only one affected. This is an appropriate case for the exercise of my discretion to extend the 30 day period to January 15, 2009.

It will be interesting to see if this approach continues to be applied.

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