



Trending Decisions

Cases we are following

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The following is a table of current cases of interest to the Canadian insolvency community as prepared by Natalie Renner and Natasha MacParland of Davies.

INSOLVENCY CASES UNDER APPEAL		
CASE	SUMMARY OF SIGNIFICANT ISSUES	STATUS OF APPEAL
<i>Canada v. Canada North Group Inc.</i> (Alberta)	Do “super priority” charges granted in a <i>Companies’ Creditors Arrangement Act</i> initial order (including debtor in possession and administrative charges) have priority over a statutory deemed trust for unremitted source deductions?	The Court of Appeal of Alberta, on August 29, 2019, confirmed the power of the Court to grant charges pursuant to the <i>Companies’ Creditors Arrangement Act</i> in favour of interim lenders, restructuring professionals and directors with such charges having priority to the company’s assets ahead of the deemed trust claims the Crown arising from the <i>Income Tax Act</i> , the <i>Canada Pension Plan</i> and the <i>Employment Insurance Act</i> . An application for leave to appeal to the Supreme Court of Canada was filed on November 12, 2019. The Insolvency Institute of Canada is an intervenor in this matter.
<i>Orphan Well Assn. v. Grant Thornton Ltd.</i> (Alberta)	In an insolvency, do environmental claims relating to oil and gas wells that are abandoned and, subject to remediation, have priority over the rights of secured creditors? Can the Alberta Energy Regulator prevent the abandonment or disclaimer of, or require the remediation of, a debtor’s assets by a receiver or bankruptcy trustee?	The Supreme Court of Canada released its decision on January 31, 2019, ruling that the environmental remediation obligations of bankrupt oil and gas companies must be fulfilled in priority over all other claims, including secured claims. Section 14.06(4) of the <i>BIA</i> does not prevent the receiver or trustee from having to comply with the remediation orders. The principles from the Supreme Court of Canada’s decision have received favourable judicial commentary and have been followed twice.
<i>Urbancorp Toronto Management Inc. (Re)</i> (Ontario)	Whether the principal of a group of companies can use corporate entities to pay his debts and the debts of other companies he controls, or whether such payments are transactions at undervalue and/or fraudulent conveyances.	The Court of Appeal for Ontario dismissed the appeal on September 27, 2019, confirming that a principal of a group of companies can use corporate entities to pay his debts and the debts of other companies he controls where such debts are not owed to non-arm’s length parties and where the debtor did not intend to defraud its creditors. As of November 28, 2019, no application for leave to appeal to the Supreme Court of Canada had been filed.

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<p><i>Callidus Capital Corporation v. 9354-9186 Quebec Inc. [Bluberi Gaming Technologies Inc.]</i> (Quebec)</p>	<p>Can a debtor whose sole remaining asset is a litigation claim seek court approval to obtain litigation financing to pursue the litigation, or does such course of action itself constitute a plan which should be submitted to and subject to the vote of creditors?</p>	<p>In a unanimous decision released on February 4, 2019, the Court of Appeal of Quebec reversed the lower court's decision.</p> <p>The Court of Appeal of Quebec ruled that:</p> <ul style="list-style-type: none"> • Litigation financing cannot be authorized to pursue a debtor's litigious claim, in the absence of an approved CCAA plan, where creditor rights are affected and where there are viable alternatives for creditor recovery. • Litigation funding forming the basis of a plan of arrangement must be disclosed in full to creditors in the context of CCAA proceedings, subject only to litigation privilege. <p>The Supreme Court of Canada heard the appeal on January 23, 2020. On the same day, in a unanimous decision, the Supreme Court of Canada allowed the appeal, overturning the decision of the Court of Appeal of Quebec. Reasons have yet to be released. The Insolvency Institute of Canada is an intervenor in this matter.</p>
<p><i>Third Eye Capital Corporation v. Ressources Dianor Inc. / Dianor Resources Inc.</i> (Ontario)</p>	<p>Two issues:</p> <ol style="list-style-type: none"> 1. Whether gross overriding royalties ("GORs") attached to mining claims are interests in land? 2. Whether, and under what circumstances, a judge has the jurisdiction to extinguish a third party's interest in land using a vesting order? 	<p>The Court of Appeal for Ontario addressed the two issues in two separate decisions:</p> <ul style="list-style-type: none"> • In the decision released March 15, 2018, the Court of Appeal for Ontario reversed the lower court's decision and held that GORs do not constitute interests in land. • In the decision released June 19, 2019, the Court of Appeal for Ontario confirmed the lower court's jurisdiction to grant vesting orders generally, but ruled that certain interests should not be vested out. The Court of Appeal for Ontario laid out a "rigorous cascade analysis" to determine whether a third party's interest should be extinguished. <p>Notice of application for leave to appeal to the Supreme Court of Canada was filed on May 14, 2018, and was subsequently extended on October 19, 2018 to allow for the further decision of the Court of Appeal for Ontario to be released. No further materials have been filed with the Supreme Court of Canada since June 19, 2019. The Insolvency Institute of Canada is an intervenor in this matter.</p>
<p><i>Canada v. Toronto-Dominion Bank</i> (Federal/Quebec)</p>	<p>Is a secured creditor required to reimburse payments made to it by a borrower who failed to remit GST source deductions, or do the deemed trust provisions require a "triggering event"; i.e. bankruptcy of the debtor, realization of security or requirement to pay?</p>	<p>The appeal was heard by the Federal Court of Appeal on October 8, 2019; its decision is pending.</p>
<p><i>United Food and Commercial Workers International Union, Local 175 v. Rose of Sharon (Ontario) Community</i> (Ontario)</p>	<p>Is a receiver a successor employer and required to respond to a notice to bargain?</p>	<p>The judicial review hearing took place on November 18, 2019. The decision was reserved and has yet to be released.</p>

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<i>PricewaterhouseCoopers Inc., as trustee in bankruptcy of Sequoia Resources Corp. v. Perpetual Energy Inc., et al.</i> (Alberta)	<p>Can a trustee in bankruptcy, in reliance on the transfer at undervalue provisions of the BIA unwind an oil and gas transfer between related companies?</p> <p>Can a bankruptcy trustee void a transaction on grounds of public policy and statutory illegality?</p>	<p>The Court of Queen's Bench of Alberta, on August 15, 2019, found that PWC, as trustee, can pursue its claim as against Perpetual Energy Inc., but dismissed PWC's claim against the CEO of Perpetual Energy Inc.</p> <p>Notice of appeal to the Court of Appeal of Alberta was filed on August 23, 2019.</p>
<i>Resolute FP Canada Inc., et al. v. Her Majesty the Queen as represented by the Ministry of the Attorney General</i> (Ontario)	<p>Does a vendor, or any of its corporate successors, lose the benefit of a previously held indemnity (specifically an indemnity relating to environmental liabilities) once it transfers the indemnity to a purchaser in a sale transaction?</p>	<p>The Supreme Court of Canada, on December 6, 2019, limited its decision to the scope of the indemnity at issue, holding that it did not cover environmental claims brought by the Ontario government. In coming to its decision, the majority did not address the issue of whether a corporate successor can benefit from an indemnity it has transferred to a purchaser.</p> <p>The issue was addressed in a strong dissent, in which the three dissenting judges agreed with the Court of Appeal for Ontario that that an assignor's right to an indemnity is extinguished upon the assignment of such indemnity. This dissent is persuasive authority, but is not a definitive answer with respect to the law on the issue.</p>
<i>Northern Sunrise County v. Virginia Hills Oil Corp.</i> (Alberta)	<p>Are municipalities' claims for linear property taxes considered to be unsecured claims under the BIA?</p>	<p>The Court of Appeal of Alberta dismissed the appeal, confirming that claims by municipalities for linear property taxes are considered unsecured claims under the BIA.</p> <p>Leave to appeal to the Supreme Court of Canada was dismissed on August 29, 2019.</p>
<i>Royal Bank of Canada v. Reid-Built Homes Ltd.</i> (Alberta)	<p>Whether a court-appointed receiver's charge securing fees and approved borrowings is discretionary and whether such charge is subordinate to a municipality's claim for property taxes.</p>	<p>On March 25, 2019, the Court of Appeal reversed the lower court's decision, ruling that although the court has discretion under s. 243(6) of the BIA with respect to the priority of a receiver's charge, this discretion must be exercised on a principled basis. The Court of Appeal ruled that, in this instance, the receiver has priority for its fees and disbursements.</p> <p>Leave to appeal to the Supreme Court of Canada was dismissed on October 10, 2019.</p>
<i>Capital Steel Inc v Chandos Construction Ltd</i> (Alberta)	<p>Is a provision in a construction contract which imposes monetary consequences on a subcontractor's insolvency enforceable in bankruptcy?</p>	<p>On January 29, 2019, the Court of Appeal of Alberta reversed a chambers decision, finding the provision unenforceable in bankruptcy, as it acts to deprive creditors of value otherwise available to them and effectively directs value to an unsecured creditor.</p> <p>Leave to appeal to the Supreme Court of Canada was granted on July 11, 2019. The hearing is scheduled for January 20, 2020. Appellant materials were filed on October 24, 2019 and Respondent materials were filed on November 26, 2019. The Insolvency Institute of Canada is an intervenor in this matter.</p>

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<i>Capital Steel Inc v Chandos Construction Ltd</i> (Alberta)	Is a provision in a construction contract which imposes monetary consequences on a subcontractor's insolvency enforceable in bankruptcy?	On January 29, 2019, the Court of Appeal of Alberta reversed a chambers decision, finding the provision unenforceable in bankruptcy, as it acts to deprive creditors of value otherwise available to them and effectively directs value to an unsecured creditor. Leave to appeal to the Supreme Court of Canada was granted on July 11, 2019. The hearing is scheduled for January 20, 2020. Appellant materials were filed on October 24, 2019 and Respondent materials were filed on November 26, 2019. The Insolvency Institute of Canada is an intervenor in this matter.
<i>Veolia Water Technologies, Inc. v. K+S Potash Canada General Partnership</i> (Saskatchewan)	Can a beneficiary be prevented from drawing on a letter of credit, where the draw would breach an agreement between such beneficiary and its creditor?	On March 19, 2019, the Court of Appeal for Saskatchewan dismissed the appeal of a chambers decision, confirming that a creditor cannot impose an injunction on a beneficiary to prevent them from drawing down on a previously provided irrevocable standby letter of credit on the grounds of breach of contract. Leave to appeal to the Supreme Court of Canada was dismissed on October 10, 2019.
<i>7636156 Canada Inc. v OMERS Realty Corporation</i> (Ontario)	How much may a landlord draw down on a letter of credit provided by the bankrupt as security for the bankrupt's obligations under a lease?	The Ontario Superior Court of Justice held that a landlord may only draw down on a letter of credit in an amount equal to three months' accelerated rent following disclaimer of the lease by a trustee in bankruptcy. Notice of appeal was filed with the Court of Appeal for Ontario on November 1, 2019.
<i>Potentia Renewables Inc. v Deltro Electric Ltd.</i> (Ontario)	Does an application judge have jurisdiction to appoint a receiver generally and where the debtor is not insolvent? Can the liability of a receiver be limited to gross negligence and wilful misconduct and does a receiver's relationship with a creditor's counsel in other matters create a disqualifying conflict of interest?	The Court of Appeal for Ontario, on October 2, 2019, dismissed the appeal, confirming that: <ul style="list-style-type: none"> • an application judge has jurisdiction to appoint a receiver regardless of whether the debtor is insolvent or not; and • that the liability of a receiver can be limited to gross negligence and wilful misconduct and that a relationship with creditor's counsel on other matters does not create a disqualifying conflict of interest. As of November 28, 2019, no application for leave to appeal to the Supreme Court of Canada had been filed.
<i>Pricewaterhousecoopers Inc. v 1905393 Alberta Ltd.</i> (Alberta)	Can an approval and vesting order be overturned due to a sales process which results in offers which are far below the appraised value of the liquidated assets?	The Court of Appeal of Alberta dismissed the appeal, confirming that claims by municipalities for linear property taxes are considered unsecured claims under the BIA. Leave to appeal to the Supreme Court of Canada was dismissed on August 29, 2019.
<i>Arrangement relatif à Gestion Éric Savard Inc.</i> (Quebec)	Can post-filing suppliers claim priority over DIP lenders on the proceeds of an asset sale in CCAA proceedings?	The Court of Appeal of Quebec allowed the appeal on August 27, 2019, finding that the claims of post-filing suppliers do not have priority over DIP lenders; such post-filing suppliers are required to petition the court to protect the amounts owing to them, as critical suppliers or otherwise. As of November 28, 2019, no application for leave to appeal to the Supreme Court of Canada had been filed.