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Carriers' Collections: An Overview of the Legislative Tools Useful for Getting Carriers Paid

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Introduction

This article provides an overview of the options and considerations for carriers or parties dealing with carriers trying to effect payment of the carriers' unpaid fees. Specific note should be taken of the various rights, remedies and restrictions under the *Highway Traffic Act*,[1] *Bills of Lading Act*[2] or the *Mercantile Law Amendment Act*,[3] the *Ontario Business Corporations Act*,[4] the *Assignment and Preferences Act*[5] and the *Fraudulent Conveyances Act*.[6] Not only is this legislation important to those trying to effect payment but also to those who have received payments which may be at risk of being challenged by other creditors. Some jurisprudence in which the provisions discussed below have been considered are also summarized below, as they provide some valuable examples of recent and/or noteworthy insights into their application.

Highway Traffic Act

The *Highway Traffic Act* ("*HTA*") may provide protection to a carrier by enabling the carrier to collect its unpaid freight charges in priority to others with debts owing to that carrier. The deemed trust provision of the *HTA* provides that "any person who arranges with an operator to carry the goods of another person" holds money received from the shipper (the "consignor") or the party receiving shipment (the "consignee") for compensation to the carrier (the "operator") in trust for the benefit of the carrier.[7] The effect of imposing a trust obligation will result in a payment being made to the carrier, in preference to any creditor of the company holding these monies, even its secured creditors.

> *Section 191.0.1(3) of the HTA provides:*
>
> *A person who arranges with an operator to carry the goods of another person, for compensation and by commercial motor vehicle, shall hold any money received from the consignor or consignee of the goods in respect of the compensation owed to the operator in a trust account in trust for the operator until the money is paid to the operator.*

Under the deemed trust provision of the *HTA*, in order for a trust obligation to arise, the party must be involved in arranging for the transportation of goods with an operator, resulting in said party being deemed to be a trustee under this Act. Therefore, a financing company which is not involved in arranging the transportation of goods will not be under a trust obligation.[8] However, a trust obligation may be imposed where a broker receives money from a financing company in consideration of an assignment of accounts receivable.[9]

In order for a deemed statutory trust created by provincial legislation, including the *HTA*, to be preserved in bankruptcy, it must conform to general trust principles.[10] One such requirement is that the property must be identified as being held in trust and not co-mingled with other property owned by the trustee.[11]

Whether or not funds received for payment of carriers' fees are segregated and properly held in trust for carriers prior to a receivership, receivers continue to be under an obligation to meet the requirements of section 191.0.1(3) of the *HTA* from and after their appointment.[12] In addition to general obligations of trustees or receivers to comply with the *HTA's* deemed trust obligations, they may be specifically required by the Orders appointing them to segregate any payments received on account of carrier's fees into appropriate accounts to be opened by them – i.e. trust accounts.[13]

It should be noted that trust obligations arising under the *HTA* are not limited to operators which carry on business in Ontario and the benefits afforded under same may be enjoyed by extra-provincial operators as well.[14] It is sufficient that the company engaging the operator to carry the goods of another is resident in Ontario.[15]

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GMAC Commercial Credit Corporation – Canada v. TCT Logistics Inc.

Facts

TCT was a freight brokerage which contracted with carriers. TCT did not maintain a separate trust account for carrier fees, in contravention of the deemed trust provisions imposed by the then applicable legilsation (*Truck Transportation Act*, R.S.O. 1990, c. T.22 and the *Load Brokers Regulation*, O. Reg 556/92, s.15, which have now been repealed and replaced with the *Highway Traffic Act* provisions).

TCT defaulted on a General Security Agreement with GMAC, who held comprehensive security over all of TCT's assets, including accounts receivables. On January 24, 2002, an interim receiver was appointed.

Issues

Were the carriers entitled to priority over the secured creditors with respect to:

(a) The funds collected prior to January 24, 2002 which were not segregated; and

(b) The pre-January 24, 2002 accounts receivables of TCT collected by the interim receiver and placed in a separate trust account.

Holding

The first group of funds were co-mingled and by losing their characteristic as funds held in trust, these funds were subject to the security interests of secured creditors. The second group of funds were held in trust and not co-mingled. These funds were therefore trust funds held for the benefit of and thus payable to the carrier.

Canadian Imperial Bank of Commerce v. Nadiscorp Logistics Group Inc.

Facts

Nadiscorp was subject to a receivership Order, which authorized the Receiver to deposit all funds received or collected into one or more new accounts. The Receiver opened a trust account and initially deposited all money received into the single trust account. Following a detailed analysis of potential claims from operators, $250,000 was transferred into a separate trust account for potential future operator claims.

Issues

Do carriers have a claim to funds held by the Receiver in priority the claim of the secured creditor?

If yes, is the priority position limited to an operator resident in Ontario?

Holding

The Ontario Court of Appeal upheld the trial decision to impose a trust obligation, stating that the case was distinguishable from GMAC on the basis that none of the funds were co-mingled with funds collected by the bankrupt prior to the receivership, and those collected by the receiver for services provided by operators remained identifiable. By meeting the requirements of a trust, the operators were given priority over the secured creditors for the unpaid freight charges. Further, this priority was found to extend to carriers not resident in Ontario where the company engaging the operator to carry the goods of another is resident in Ontario.

Bills of Lading Act

Under section 2 of the federal *Bills of Lading Act* ("*BLA*") and section 7 of the provincial *Mercantile Law Amendment Act* ("*MLAA*"), there is a presumption that a consignee is responsible for a carrier's unpaid freight charges. These sections create a statutory privity contract so as to eliminate the need for a finding of privity of contract between the carrier and the consignee so that the carrier can recover its freight charges.[16] For a consignee of goods named in a bill of lading to be liable, it must be a party "to whom the property in the goods therein mentioned passes upon" and the bill of lading must function as a receipt of goods and an undertaking to transport these goods.[17]

A consignee may be able to rebut the presumption of liability by proving the existence of another arrangement that the shipper alone would be responsible for the freight charges and that the carrier has waived protection under section 2 the *BLA*.[18] Whether the carrier has knowledge of the arrangement may be a significant factor in a consignee successfully being able to rebut the presumption of liability by proving the existence of another arrangement.[19]

Section 2 of the *BLA* provides:

> Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself.

Section 7(1) of the *MLAA* provides:

> Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon, or by reason of the consignment or endorsement, has and is vested with all rights of action, and is subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with the consignee or endorsee.

To protect their rights to payment under the *BLA* or *MLAA*, carriers should be advising consignees of the carriers' involvement and should notify the consignees of any unpaid invoices, as doing so may prevent consignees from successfully arguing that they have discharged their payment obligations to the carriers in having made their payments to freight forwarding companies or brokers.[20]

The Court has found that where carriers concealed the unauthorized subcontracting of the shipping contract from the consignee, the carrier ultimately responsible for transport of the goods could not rely on the *BLA* or the *MLAA* to effect payment from the consignee.[21]

Cassidy's Transfer & Storage Limited v. 144736 Ontario Inc.

Facts
The Government of Canada entered into an agreement with 144736 Ontario Inc. operating as Canada One Sourcing ("Canada One") to supply army socks to Canadian Forces Bases. The plaintiff was contracted by Canada One to transport the goods to the bases. Six of the eight bills of lading at issue stated "Received, subject to the contract between the Shipper, Consignee or Third Party and the carrier in effect on the day of shipment. . .." The consignees on the bills of lading were either the Canadian Forces Base in Montreal or Edmonton.

The Government of Canada attempted to argue that the plaintiff carrier could not rely on section 2 of the BLA because the bills of lading incorporated a previous contract between the consignor and consignee by reference and therefore excluded additional payments to be made by the consignee for shipping.

Issue
Could the plaintiff carrier rely on section 2 of the BLA to hold the consignee liable?

Holding
The court, in rejecting the Government's argument, emphasized that it had failed to meet the onus on it to displace the legal effect of the BLA by proving that the plaintiff carrier had entered into another agreement that exonerated the Government. In addition, although the bills of lading did not contain an express undertaking, there was an implied undertaking that the carrier would transport the goods, which was evidenced by the consignee signing the bills of lading. Accordingly, the plaintiff carrier was entitled to rely on the BLA to require payment from the consignee.

Challenges to Payments Wrongfully Made

The following legislation may be relied upon in order to challenge transactions and/or to hold parties thereto liable to creditors adversely affected by same. The consideration of each is important when attacking improper payments made to competing creditors or when attempting to protect funds received from risk of attack by others.

Oppression Remedy

Under the *Ontario Business Corporations Act* ("OBCA"), a "complainant" may bring a claim against a corporation on the grounds that the affairs of the corporation are being carried out in a manner that unfairly disregards the interests of, among others, a creditor.[22]

While the courts are given broad remedial powers under s.248, a party must first qualify as a "complainant" under section 245, which defines complainant as a person who, in the discretion of the court, is a proper person to make an application under section 248. The oppression remedy is more commonly relied upon by shareholders whose interests are being unfairly disregarded. However, both the legislation and the Courts have made it clear that it is also available to aggrieved creditors, although it is generally more difficult for creditors to successfully claim under the oppression remedy than in cases where the complainant is a shareholder.[23]

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

Creditors have been successful under the oppression remedy where the corporation's conduct effected a result which was prejudicial to the creditor.[24] An important benefit of a successful oppression remedy claim is that liability for the wrongful acts may extend beyond the corporation to its officers and directors personally.

For a creditor to be allowed to proceed under s. 248, it must first be established that it was a creditor.[25] There further must be a reasonable expectation on the part of the creditor that a company's affairs will be conducted with a view to protecting that creditor's interests.[26] A person claiming a contingent interest in an uncertain claim for unliquidated damages will likely not be deemed to be a creditor for the purposes of an oppression remedy claim.[27]

Payment in Preference

Related to an argument under the oppression remedy would be a claim that payments made by a company to other creditors constitute an unjust preference within the meaning of section 4(2) of the *Assignment and Preferences Act*. This would apply in circumstances where payments are made on the eve of insolvency with the intent of preferring one creditor over another.

A breach of section 4(2) of the *APA* would result in the payments being void, with the amounts to be repaid to the corporation, for the benefit of all of the creditors "injured, delayed, prejudiced or postponed" as a result of the payment.[28]

Fraudulent Conveyance

Another option available to attack a transfer as improper would be under the *Fraudulent Conveyances Act* where the conveyance of real property or personal property is made with the intent to defeat, hinder, delay or defraud "creditors or others" of their lawful actions, debts

or accounts.[29] "Creditor or others" may extend to persons who do not yet have judgment against an individual, but have a claim for unliquidated damages.[30]

In order to be successful, the party must establish the validity of their claim and must establish an intent to defeat creditors.[31] A successful finding of a fraudulent conveyance will hold both the transferor of the asset and the recipient of the asset liable for the conveyance.

Conclusion

Knowledge of the statutory tools made available to parties by the legislation referred to above will assist in ensuring that carriers are able to get paid for shipments transported by them. It will also ensure that carriers are aware that they continue to have recourse in cases where monies were wrongfully paid to others to the detriment of the carriers who are owed money.

Please note that the discussion above is not a detailed analysis of the aforementioned legislation or the body of jurisprudence in relation thereto and should not be relied upon as such. Rather, it is meant to highlight for your attention and further consideration potential avenues of recovery, which we hope you will find of assistance.

Endnotes

1. R.S.O. 1990, c H.8 [*HTA*]
2. R.S.C. 1985, c B-5 [*BLA*]
3. R.S.O. 1990, c M.10 [*MLAA*]
4. R.S.O. 1990, c. B.16[*OBCA*]
5. R.S.O. 1990, c. A.33 [*APA*]
6. R.S.O. 1990, c. F.29 [*FCA*]
7. *HTA* at s.191.0.1(3).
8. *JSD Transport v. Sam Transportation & Brokerage Inc.* [2009] O.J. No. 4669 [*JSD Transport*] at paras 31-32.
9. *JSD Transport* at para 36.
10. GMAC; *Norame Inc. (Re)*, 2008 ONCA 319 (CanLII); and *Canadian Imperial Bank of Commerce v. Nadiscorp Logistics Group Inc.*, 2009 CanLII 50866 (ON SC) [CIBC], approved by the Ontario Court of Appeal at 74 O.R. (3d) 382 (Ont. C.A.), [GMAC], at paras 14-15
11. GMAC at para 14.
12. CIBC at para 15 and GMAC at paras 34-36.
13. CIBC at paras 13-16.
14. CIBC at para 31.
15. CIBC at paras 29 and 31.
16. *Cassidy's Transfer & Storage Limited v. 144736 Ontario Inc.*, 2011 ONSC 2871 (CanLII) [*Cassidy's Transfer*] at para 26
17. *BLA* at s.2. and *JSD Transport* at para 61.
18. *Cassidy's* at para 26.
19. *Cassidy's* supra at para 30.
20. *Saima Avendero A.p.A. v. Coppley Noyes & Randall Ltd* [2000] O.J. No. 2841 [Coppley] at para 36 and 38.
21. In *Liberty Linehaul Inc. v. Cangro Foods Inc.* 2011 ONSC 7242 at para 10.
22. *OBCA* at s.248(2)
23. *John R. Fortnum v. Royal City Plymouth Chrysler (1991) Ltd., Chris Stogios and Georgina Stogios*, 2006 CanLII 42789 (ON SC) [Fortnum] at para 16.
24. *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* [1998] O.J. No. 2910 (Ont. C.A.).
25. *Glasvan Great Dane Sales Inc. v. Qureshi*, 2003 CanLII 39647 (ON SC) [Qureshi] at paras 31-33.
26. *Fortnum* at para 16.
27. *Royal Trust Corp. of Canada v. Hordo* [1993] O.J. No. 1560, 10 B.L.R. (2d) 86 (Ont. Gen. Div. – Commercial List) at para 13.
28. *Quereshi* at para 38.
29. *FCA* at s.2.
30. See discussion in *MacDonald v. Stranger (c.o.b. Acorn Building Contractors)* [2002] O.J. No. 1958 [MacDonald] at paras 92-95.
31. *MacDonald* at para 96-99.