

Load Brokers' Trust Obligation under the Ontario Highway Traffic Act in the Context of Priority Disputes under the Bankruptcy and Insolvency Act

Transportation & Logistics

1 October 2026

In our Transportation and Logistics 2025 Q4 newsletter, the first part of this two-part series examined the trust obligation in the context of directors' and officers' liability.

Review of the Trust Obligation

By way of review, as mentioned in Part 1, Ontario continues to be the only province in Canada requiring that persons who arrange for carriage, typically load brokers or "load arrangers", hold "in trust" any freight charges earmarked for the associated carriers.

Prior to the enactment of the current *Highway Traffic Act* ("HTA"), carriers were frequently at the mercy of unscrupulous or eventually insolvent load brokers that had already received freight payment from the shipper, but had failed to pay the carrier.

To combat this problem, the *Load Brokers Regulation* (Ontario Regulation 556/92) under the former Ontario *Truck Transportation Act* was enacted to regulate the activities of load brokers. Regulation 556/92 required load brokers to register with the Ministry of Transportation, to obtain and maintain a surety bond and to hold "in trust" those funds that a load broker owed to carriers for freight charges. To most carriers, this regulation was ineffective, especially given the lack of enforcement by the Ministry of Transportation.

Deregulation efforts saw the repeal of the Ontario *Truck Transportation Act* and Regulation 556/92 as of January 1, 2006. One provision of the *Load Brokers Regulation* was reborn as part of the HTA, specifically, [section 191.0.1\(3\)](#) for the trust fund requirement, applying to all "persons" (which arguably may include any carrier who sub-brokers a load). This section continues to be important as a tool for carriers to collect freight charges (particularly in bankruptcy and insolvency situations) though there continues to be no regulatory "teeth" to enforce such trust provisions in the normal every day course of business. The trust protection afforded to carriers regarding freight owed by Ontario-based load brokers is based on an honour system. While not specifically enforced, that provision has been a key factor in priority disputes where the load broker has declared bankruptcy or entered into voluntary receivership.

Priority Disputes and the HTA Trust Obligation

Case law continues to be limited regarding how the courts have dealt with carrier claims generally or in priority disputes or whether the corporate veil will be lifted to allow for personal liability of officers and directors where funds are not held separately in trust.

Outside of priority disputes, lack of enforcement and litigation regarding unpaid freight charges often leaves the carrier unpaid and opens the doors for legal creativity.

The Legislation – The Statutory Trust

Contracts of carriage

191.0.1 (1) Every contract of carriage for a person to carry the goods of another person by commercial motor vehicle for compensation shall contain the information required by the regulations and shall be deemed to include the terms and conditions set out in the regulations. 2002, c. 18, Sched. P, s. 34.

...

Money for contract of carriage held in trust

(3) 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. 2002, c. 18, Sched. P, s. 34.

Other rights unaffected

(4) Nothing in subsection (3) derogates from the contractual or other legal rights of the consignor, the consignee, the operator or the person who arranged for the carriage of the goods with respect to the money that is held in trust under that subsection. 2002, c. 18, Sched. P, s. 34.

(emphasis added)

Case Law

(a) *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.* 2005 CanLII 3584 (Ont. C.A.) (“*GMAC v. TCT*”)

Section 15 of the *Load Brokers Regulation*, in force at the time of this case, provided that:

... every load broker shall hold in trust for the benefit of the carriers to whom the load broker is liable all of the money that the load broker receives in respect of the carriage of goods.

The Court held that any statutory deemed trust created by section 15 would not be a trust for the purposes of section 67(1)(a) of the *Bankruptcy and Insolvency Act* (“BIA”), and thereby excluded from distribution to creditors, *unless* such trust otherwise conformed with the three common law trust principles of certainties of intention, object and subject matter and, specifically, that the funds be segregated.

The Court of Appeal for Ontario ruled that any co-mingled (or mixed in) monies (which included freight charges intended for the carriers) received by the bankrupt *prior* to the receivership had not been properly maintained separately and “in trust”. Therefore, those funds originally earmarked for the carriers became part of the bankrupt’s estate generally, the funds having lost their “trust” character. As such, the usual priority distribution rules under bankruptcy law applied and the secured creditor “outranked” the carriers in terms of recovery.[1]

(b) *Re Norame*, 2008 ONCA 319

Norame Inc. carried on business as a load broker for shippers of goods such as Dimplex North America. Norame engaged a carrier, Vitran Corporation, to ship Dimplex’s goods. Dimplex paid Norame but, unfortunately for Vitran Corporation, Norame (at some point prior to Vitran receiving payment) filed a voluntary assignment into bankruptcy. Norame had also co-mingled monies received as freight charges from its shipper customers and intended for carriers with its own money. Norame was required to segregate those trust funds in a separate trust account as per the *Load Brokers Regulation* (Regulation 556/92), then in force.

In this case, the question concerned monies received *after* the filing in bankruptcy. The Court, on application by the Trustee for directions, ordered all monies owed by shippers in respect of carriage services be paid to the Trustee to be held in a separate account. Ultimately, the Court ruled that those segregated funds satisfied the conditions for a trust and accordingly were to be paid to Vitran. The carrier had argued that it was entitled to the funds pursuant to section 67(1)(a) of the BIA which provides that a bankrupt’s property is available for distribution to creditors; however, such does not include “*property held by the bankrupt in trust for any other person*”. The Trustee maintained that it held the funds for distribution to Norame’s creditors pursuant to the *Bankruptcy and Insolvency Act*.



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Recall that section 15 of the *Load Brokers Regulation* (the "Section 15 trust obligation"), in force at the time, provided that every load broker:

...shall hold in trust for the benefit of the carriers to whom the load broker is liable all of the money that the load broker receives in respect of the carriage of goods.

The Trial Court ruled, based on *GMAC v. TCT*, that any statutory "deemed trust" created by the Section 15 trust obligation would not be a trust for the purposes of section 67(1)(a) of the BIA, and thereby excluded from distribution to creditors unless the funds were properly segregated and held their "trust" character.

In *GMAC v TCT*, the interim Receiver was bound by the Section 15 trust obligation with regard to carrier freight charges that it collected *after* the receivership's commencement. Those funds collected after the commencement of the receivership were required to be segregated and held "in trust". The issue in that case related to funds not held in trust and received by the debtor *before* the receivership commenced.

The Trustee, in *Re Norame*, had attempted to argue, regarding funds collected *after* the commencement of the bankruptcy, that it was not subject to the same rules as the Receiver in *GMAC v TCT*. The Trustee argued that it was not continuing to run the business of the bankrupt as the Receiver did in that case and so did not need to keep the funds segregated. The Court held that, in the case of priority disputes, there was no difference between a Receiver carrying on the business of a company and a Trustee in Bankruptcy since the Trustee in Bankruptcy would be required, upon receiving funds that were required to be segregated, to hold those funds in a separate trust account. The Trustee would continue to hold those funds in accordance with the Section 15 trust obligation for the benefit of the unpaid carrier as beneficiary.

It was held that a load broker's non-carrier creditors were not entitled to monies paid to the Trustee in Bankruptcy in respect of a carrier's shipping services where such funds were required to be segregated into a separate trust account for the benefit of those carriers.

(c) *CIBC v. Nadiscorp Logistics Group Inc.*, 2009 Can LII 50866 (Ont. S.C.), aff'd, 2010 ONCA 397

This was another case involving a bankrupt load broker and the resulting priority dispute involving secured creditors against unpaid carriers. The Court of Appeal for Ontario gave very brief reasons in its dismissal of the appeal and cross appeal of the trial decision.

Nadiscorp Logistics Group Inc. ("Nadiscorp") was a logistics company that arranged services for shippers and engaged the services of truckers in that regard. The carriers in this matter did not carry goods into or out of Ontario. Typically, shippers paid freight charges to Nadiscorp, which would then pay the carriers. Unfortunately, Nadiscorp went into receivership and a receiver was appointed to handle all the property and business including undertakings of Nadiscorp.

Pursuant to the receivership order, the Receiver was authorized to deposit all funds received or collected by it "into one or more new accounts to be opened by the Receiver". Accordingly, the Receiver opened a general trust account and deposited all the funds it received or collected. The Receiver was aware that there was a trust obligation under the HTA and its predecessor legislation and that logistics companies such as Nadiscorp were required to hold "in trust" those funds that were received from shippers and intended for carriers.

The Receiver had made a review to determine if Nadiscorp owed any monies to any carriers and transferred the sum of approximately \$300,000 from the general trust account into a separate trust account as owing for carriers' trust claims. Needless to say, the secured creditors, particularly Hospitals of Ontario Pension Plan ("HOOPP"), did not agree that such a "priority" should be given to the claims of the carriers. Another issue arose as to whether only "Ontario" carriers would be able to so claim, if the priority was valid, as Ontario was the only province with such a "trust" obligation.

i. Status as "Trust Funds"

Citing *GMAC v. TCT* and the *Re Norame* decisions, HOOPP submitted that the Receiver had not complied with the requirements of the HTA trust obligation when collecting receivables and, as such, those monies allegedly earmarked by Nadiscorp's Trustee for the carriers were not maintained in "trust" as was required to establish priority. Those funds, it was alleged, had not been segregated when received and kept in a separate trust account for the carriers, but instead had been improperly co-mingled into the general trust account. Accordingly, the general trust account opened initially by the Receiver and into which all amounts had been deposited did not conform to general trust principles and, even though the funds were later separated, the funds had, at that moment in time, lost their status as "trust funds". Therefore, it was argued that the carriers had lost the protection afforded by the HTA and lost the associated priority over the secured creditors in the bankruptcy proceedings.

The Ontario Superior Court did not agree with HOOPP's submission and held that the Receiver was required to comply and did comply with both the aforementioned provision of the HTA as well as the relevant Receivership Order. The Court ruled that all of the funds in the Receiver's account were always



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considered funds held in trust for the creditors of Nadiscorp regardless of which trust account the monies were initially kept in. The Receiver had deposited all initial monies into a general trust account, thereafter transferring the amount of \$300,000 into a separate trust account to fund potential carrier trust claims. Both accounts were trust accounts to the benefit of creditors and were not used for other purposes or with those not in the nature of trust funds. Accordingly, the Court held that the funds earmarked for the carriers had not lost their status as trust funds. As such, the Court found for the carriers in terms of priority over the secured creditors. This was a significant win and the Court of Appeal agreed. It stated in brief reasons:

In our view, the funds collected by the receiver never lost their character as trust funds. Unlike the case of *T.C.T. Logistics Inc.*, none of these funds were co-mingled with funds collected by the bankrupt company pre-receivership, and those collected by the receiver for services provided by carriers remain identifiable. The appeal therefore fails.

ii. *Outside of Ontario Carrier claims protected by the HTA trust obligation?*

The second issue in the case was which of the carriers would be protected by the HTA trust obligation and also the legislation's associated scope.

Counsel for the Receiver took the position that any carrier that did not carry goods into or out of Ontario was not entitled to the benefit of the HTA trust obligation. The carriers in this case did not carry goods for Nadiscorp into or out of Ontario and were not resident in Ontario. They were, then, not automatically within the purview of the Ontario legislation. The carriers had, however, carried goods for Nadiscorp in other Canadian jurisdictions and counsel for these carriers argued that consideration of the "reach" of the legislation should be whether or not Nadiscorp itself, as operating in Ontario, was bound by the HTA and the HTA trust obligation, as opposed to concerning an analysis as to *where* the carriers happened to undertake their mandate.

The Court ruled that the applicability of the HTA trust obligation did not depend on an analysis of the contracts as between the broker and the carrier and the particular geographic routing of the carrier for any shipment in question. Rather, the question was whether the operations of Nadiscorp were governed by the HTA.

The Court found that the HTA trust obligation concerned any "person who arranges with an operator to carry the goods of another person". Nadiscorp conducted its business in Ontario and it engaged the services of various operators or carriers to transport various loads both interprovincially and intraprovincially.

Counsel for the "outside of Ontario" carriers submitted that it followed that Nadiscorp's arrangement of the carriage of the goods in question, therefore, took place in Ontario, where Nadiscorp conducted its business. Insofar as the orders to carry goods originated in or were arranged from Ontario, it was submitted that the "out of Ontario" carriers should benefit from the protection of the HTA trust obligation.

The Court accepted this submission, ruling that, insofar as Nadiscorp arranged the carriage of goods of another person while Nadiscorp was a resident in Ontario, there was no basis upon which the Receiver could discriminate between carriers who were resident in Ontario and those who were not, or as concerns where they happened to undertake their services once mandated by Nadiscorp. The Court also noted that there is nothing in the definition of "operator" in the HTA to suggest that the term is limited to a carrier resident in Ontario.

The Court of Appeal agreed and said in its brief reasons dismissing the cross appeal,

...we agree that the purpose of s. 191.0.1(3) is to impose obligations on persons in Ontario who arrange with an operator to carry the goods of another person. That is what the Ontario Legislature intended and what it is empowered to enact. The cross-appeal therefore is dismissed.

The monies claimed by the unpaid carriers retained their nature as trust funds and the protection of the HTA trust obligation applied to any carrier engaged by Nadiscorp, as a resident of Ontario. The carriers maintained their priority over the secured creditors.

Other Provinces

Regarding other provinces, the non-payment of a carrier by the unscrupulous or bankrupt load broker will happen, but without the deemed trust protection as there is in Ontario where load brokers are required to hold freight charges in trust for the carrier. Accordingly, there will be no issues in priority disputes of the same nature as discussed above outside of Ontario.[2]

Does the Debt Arising from Breach of Trust Survive Bankruptcy?

While comments here are not meant to be exhaustive, it bears considering that section 178(1)(d) of the BIA could, depending upon how the trust funds were managed, operate to block the discharge of such a debt arising out of a fiduciary capacity.



Section 178(2) of the BIA establishes that an order of discharge releases a bankrupt from all claims provable in bankruptcy subject to subsection (1).

Section 178(1) of the BIA provides several exceptions to the rule, at [section 178\(2\)](#), that a discharge releases the bankrupt from all claims provable in bankruptcy. The only potentially applicable exception is at [section 178\(1\)\(d\)](#), which provides that “an order of discharge will not release a bankrupt from “any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity...”

While fraud and embezzlement may be more obvious on the evidence, the issue may often become whether the co-mingling and misuse of the trust funds is a “misappropriation or defalcation” of the funds subject to the trust.

The Court of Appeal for British Columbia, in *Valastiak v. Valastiak*, 2010 BCCA 71, 3 BCLR (5th) 1, considered the meaning of “misappropriation” as used under the BIA. Reviewing the jurisprudence in British Columbia, the Court, at [paragraph 31](#), held that “misappropriation”, as opposed to being mere mismanagement, is characterized by “some element of wrongdoing, improper conduct or improper accounting.” Accordingly, the Court went on to find that the bankrupt’s use, “as a personal piggy bank”, of property held in trust by his closely-held corporation amounted to a wrongful use of trust property that triggered [section 178\(1\)\(d\) of the BIA](#).

This interpretation has been positively received in Ontario, including by the Court of Appeal for Ontario in *Korea Data Systems (USA) Inc. v. Amazing Technologies Inc.*, 2015 ONCA 465, 126 OR (3d) 81, where the Court held that [section 178\(1\)\(d\)](#) must be construed narrowly and that its focus is on debts incurred by the bankrupt breaching a fiduciary obligation to the creditor.

Last Point: Can the Parties Contract out of the HTA Trust Obligation?

There is a paucity of case law on whether parties can agree not to be bound by the HTA trust obligation and, in fact, there is very little treatment on interpreting contracts of carriage in Ontario on the whole. The Court, in the next case from 2016, noted that this issue had not been judicially considered and, other than this case, has not since been judicially considered to the writer’s knowledge.

In *E-Conomy Finance Group Ltd. v. FLS Transportation Services Inc.* 2016 CanLII 30099 (Ont. Sm. Cl. Ct.), the Ontario Small Claims Court reviewed [Regulation 643/05](#) under the HTA. [Section 4\(2\)](#) of that regulation provides that certain uniform conditions of carriage are “deemed” to be terms and conditions of every contract to which that section applies. Uniform condition 5 provides, in part, that a carrier shall not be liable for damage to goods caused by an act or default of the consignor, owner or consignee.

The Court held that the “deeming” provisions in this section were not conclusive but presumptive only, which presumption can be displaced if some other state of affairs is proven to be the case, including by contracts entered into by the parties.

Regarding the wording of [subsection 191.0.1\(4\)](#) of the HTA, the Court held that the wording was clear on its face that nothing in the trust requirement in [subsection \(3\)](#) derogated from the rights of the parties under contracts entered into by those parties. The Court declined to exercise the defendant’s contractual set-off right under their carrier agreement because of findings of fact made on liability in the case.

Whether or not parties can contract out of these statutory provisions in Ontario seems to be just a little less muddy at this point, though it would appear that such contracting out might/should be possible given the wording of [subsection 191.0.1\(4\)](#) supported by the fact that Ontario has freedom of contract. However, this decision is that of the Ontario Small Claims Court, so it is not binding on higher courts. It also has not been referred to in any other decision to the writer’s knowledge. Courts in the future may, in other circumstances, be loathe to interfere with and render ineffective a statutory trust and may possibly apply [subsection 191.01\(4\)](#) only in respect of other contractual rights under the contract keeping the trust in place.

Finally

Once again, it is clear from all of the above that, in any event, the HTA trust obligation should be carefully addressed in the drafting of the terms of any transportation agreement.

[1] It is also interesting to note that the Court did not accept the proposition that a computerized accounting system was sufficient to provide certainty of subject matter required for a common law trust. While the “segregated” aspect of a statutory trust is clear in the legislation, we have no guidance as to whether one separate bank account will suffice to ensure all carrier freight amounts are considered segregated or whether multiple accounts are required delineated by carrier.



[2] It should be noted that, while there is no obligation for a load broker in the province of Québec to hold freight charges “in trust”, such intermediaries (including load brokers) must still register with the Commission des transports du Québec. The Commission maintains a public online list of registered intermediaries who may legally offer transportation intermediary services in Quebec. Contracts with unregistered intermediaries may be null and void.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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